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Brf. of Atty. Gen. (Boyd & Shaver)
for Appellee.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 481.

THE EAST TENNESSEE, VIRGINIA and GEORGIA RAILWAY COMPANY et al., appellants,
v.
THE INTERSTATE COMMERCE COMMISSION, appellee.

Appeal from the United States circuit court of appeals for the sixth circuit.

ARGUMENT IN BEHALF OF THE APPELLEE, THE INTERSTATE COMMERCE COMMISSION.

JAMES E. BOYD,
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L. A. SHAVER,
For Appellee.

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CHAPTER I.

STATEMENT OF CASE AND PLEADINGS.

This case originated from a complaint of the Board of Trade of Chattanooga, Tenn., against the defendant carriers, made to the Interstate Commerce Commission under section 13 of the act to regulate commerce.

This complaint contained *three* distinct charges or allegations of violations of the act to regulate commerce:

1. That the through rates of the defendants on traffic from the eastern seaboard cities, Baltimore, Philadelphia, New York, and Boston, *to Chattanooga* were unjust and unreasonable in themselves, and therefore in violation of section 1 of the act to regulate commerce, which requires "all rate charges to be just and reasonable."

2. That Chattanooga, Nashville, and Memphis compete for business in the same territory, and that the rates of defendants from said eastern seaboard cities to *Chattanooga, Nashville, and Memphis* gave an undue preference and advantage to Nashville and Memphis over Chattanooga, in violation of section 3 of the act,

which prohibits the making or giving any "undue preference or advantage to any locality *in any respect whatsoever*" and the subjecting "any locality to any undue prejudice or disadvantage *in any respect whatsoever*."

3. That the rates of the defendants from said eastern seaboard cities to Chattanooga are higher for the shorter haul to Chattanooga than for the longer haul through Chattanooga 151 miles on to Nashville and 310 miles on to Memphis, and that this is in violation of the "long and short haul" rule of section 4 of the act, which forbids the exaction, under substantially similar circumstances and conditions, of a greater charge for the shorter than the longer haul over the same line in the same direction, the shorter being included within the longer haul.

After due notice of these charges had been served upon the defendants and they had filed answers thereto, and after testimony taken and argument had in behalf of all parties in interest, the Commission ordered or notified the defendants "to cease and desist from making, enforcing, or receiving any higher rates for the transportation of traffic from eastern seaboard cities to Chattanooga than are accepted by them at the same time for like transportation to Nashville."

The Commission did not in its order expressly require that the rates to Chattanooga should not be higher than the rates to Memphis, because, as it states in its opinion, the Memphis rates being higher than the Nashville rates,

the making of the Chattanooga rates not higher than the Nashville rates would result in making the Chattanooga rates less than the Memphis rates, and therefore a compliance with the order of the Commission as to the rates to Chattanooga and Nashville would operate a readjustment of the rates as between Chattanooga and Memphis.

(See Record, p. 51.)

The order of the Commission, therefore, merely required that the rates to Chattanooga should not be higher than the rates to Nashville.

The defendants refused or neglected to obey the order of the Commission, and thereupon the Commission instituted the present proceeding in equity, under section 16 of the "Act to regulate commerce," in the circuit court of the United States for the eastern district of Tennessee.

A large amount of additional testimony was taken in the circuit court, and that court found that the order of the Commission was a lawful order, and decreed its enforcement. The defendants thereupon appealed to the circuit court of appeals for the sixth circuit, at Cincinnati, and that court affirmed the decree of the circuit court enforcing the order of the Commission. From that decree the case is now brought to this court on appeal.

The order of the Commission has thus, after due and thorough investigation, received the sanction of three tribunals—*first*, that of the Interstate Commerce Commission, a board or tribunal constituted by law for the investigation and determination of such questions, having long experience therein and being given by the law exceptional means and facilities for acquiring accurate knowledge in reference thereto; *second*, that of the United States circuit court for the eastern district of Tennessee (Judge Severens presiding), and *third*, that of the circuit court of appeals for the sixth circuit, composed of Mr. Justice Harlan and Circuit Judges Taft and Lurton, *whose decision was unanimous.*

ISSUES PRESENTED BY THE PLEADINGS IN COURT.

As before stated, the complaint filed before the Interstate Commerce Commission by the Board of Trade of Chattanooga charged the defendants with violations of sections *1*, *3*, *and 4* of the law. The petition or bill of complaint filed by the Commission in court embodies and has attached as an exhibit a copy of the complaint before the Commission and alleges that "it had been made to appear to the satisfaction of the Commission that the defendants had violated the provisions of the act to regulate commerce," as stated in the complaint before the Commission of the Board of Trade of Chattanooga. (Record, p. 6.)

The defendants in their answers filed in court deny that their rates are in violation of law as alleged.

The questions, then, whether the defendants' rates involved in this case are in violation of either sections 1, 3, and 4 of the law are distinctly in issue before the court.

The testimony before the Commission and that taken in the case before the court relate to these three issues.

CHAPTER II.

CHARGES THAT THE RATES OF DEFENDANTS ARE IN VIOLATION OF SECTIONS 3 AND 4 OF THE LAW.

COMPETITION PLEAD IN ANSWER TO THESE CHARGES.

ANSWERS TO PLEA OF COMPETITION.

We will first consider the last two charges, namely, that the rates of the defendants from the eastern seaboard to Chattanooga and Nashville are in violation of section 3 of the law in that they give an undue preference to Nashville over Chattanooga, and are in violation of section 4 of the law in that they are higher for the shorter haul to Chattanooga than for the longer haul through Chattanooga to Nashville.

In answer to these two charges the carriers interpose a defense in the nature of a plea of *confession and avoidance.* They admit or confess their discriminations against Chattanooga, but allege that, enormous as they are, those discriminations are not unjust, because, they say, they are compelled to make them by the greater force of competition in transportation from the eastern seaboard at Nashville than at Chattanooga.

ANSWERS TO PLEA OF COMPETITION.

In answer to this plea of competition, the main propositions for which we contend in behalf of the Commission are:

First. That as matter of fact the force of competition on transportation from the eastern seaboard to Nashville is not controlling or such as affects rates at Nashville to the extent of requiring them to be lower than rates to Chattanooga.

Second. That the factors or elements of competition in transportation from the eastern seaboard cities to Chattanooga are many times greater than on such transportation to Nashville, and that, therefore, under *normal* conditions the competition should be greater at Chattanooga than at Nashville.

Third. That the rates to Chattanooga by all routes from the eastern seaboard have been for a long period of time and are now established by *agreement* between the carriers as members of associations of southern railway and steamship companies; that this agreement fixing the rates *has restrained or stifled normal* competition at Chattanooga and prevented the reduction of the Chattanooga rates, and that a dissimilarity of conditions thus brought about by the agreement of the carriers can not justify discriminations.

Fourth. That even where some discrimination is justifiable because of the greater force of competition at the locality in favor of which the discrimination is made, the discrimination actually practiced may be excessive, and in this case it is *excessive.*

Fifth. That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discriminations practiced against Chattanooga and in favor of

Nashville, *brings the case within the evil which the act to regulate commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself—in other words, should not be held to justify the very wrongs which the law was enacted to remedy.*

Sixth. That, inasmuch as the order of the Commission is simply that the carriers desist from charging higher rates to Chattanooga than to Nashville, it may be complied with (if the carriers so elect) by giving Chattanooga rates as high as those to Nashville, thus ignoring the natural advantage of the former in being the shorter-distance point, and this will be a reasonable allowance for any possible dissimilarity of condition resulting from the competition at Nashville shown in this case.

CHAPTER III.

THE PLEA OF COMPETITION.

CASES IN WHICH AND EXTENT TO WHICH COMPETITION MAY JUSTIFY EXEMPTION FROM THE RESTRAINTS OF SECTIONS 3 AND 4 OF THE LAW.

At the outset it is material to inquire in what cases and to what extent this court has held competition may justify discrimination.

Section 4 of the interstate-commerce law forbids the greater charge for the shorter than the longer haul only when the circumstances and conditions attending the transportation are "*substantially similar.*" *Section 3* forbids preferences between localities when they are undue or unreasonable, and this court holds that they are undue or unreasonable when the transportation is conducted under "*substatially similar circumstances and conditions.*"

The question, then, in this case, under sections 3 and 4, is whether the circumstances and conditions relating to the transportation from the Eastern seaboard to Chattanooga and Nashville, respectively, are "*substantially*

similar." If they are substantially similar, then the discriminations against Chattanooga are unjust and unlawful.

In the "Alabama Midland Case" (168 U. S., p. 164), it is true this court held that competition is "one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar," and that competition may, therefore, justify preferences under section 3 of the law, and the greater charge for the shorter than the longer haul under section 4.

The court then, however, takes particular pains to qualify or limit this proposition as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that *the mere fact of competition*, no matter what its character or *extent*, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the question of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition *may* in some cases be such as, having due regard to the *interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration." (168 U. S., 167.)

"The mere fact of competition" does not, therefore, under this decision take a case from under the law as

laid down in the third and fourth sections, but only relieves the carrier from the restraints of those sections when the competition is of such "character and extent that the interests of the public," as well as of the carrier, demand such relief; and the court further holds that, whether the competition is of such character and extent that the interests of the public and the carrier justify exemptions from the restraints of the third and fourth sections, is a question of fact to be determined by the testimony in each case and not a question of law.

The above extract from the opinion of this court in the "Alabama Midland Case" is quoted and the propositions therein reaffirmed by this court in *Louisville and Nashville Railroad Co. et al* v. *Behlmer*, decided at the present term, and which will hereafter be referred to as the "Behlmer Case." The following is the language of this court in that case:

"It follows that whilst the carrier may *take into consideration* the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, the absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may, in many cases, be involved in the determination of whether competition was such as created a substantial dissimilarity of condition; second, that the competition relied upon be *not artificial* or merely conjectural, but *material and substantial*, thereby operating on the question of traffic and rate making, *the right in every event to be only enjoyed*

with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered." (Pamph., p. 15.)

Judge Severens, in the opinion of the circuit court, delivered by him in the present case, in discussing the "Alabama Midland Case," says:

"In the case of the Interstate Commerce Commission *v.* The Alabama Midland Railway Company (168 U. S., 144) the Supreme Court, while reaffirming the doctrine that competition between railway carriers might and frequently ought to be considered in adjusting rates under the long and short haul clause, *yet took pains to prevent the inference from its opinion that it should be regarded as a controlling consideraton.*" * * *

"Congress must have intended something unusual and peculiar, out of the ordinary course of business, as that which would create a substantial dissimilarity; otherwise the vast bulk of transportation would not be subject to the rule at all." (Record, p. 374.)

That Congress did not intend that competition should in all cases justify the greater charge for the shorter haul under section 4 appears from the fact testified to by all the witnesses, both for the complainant and for the defendants, that, at the time the act to regulate commerce was passed and prior thereto and since, the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter being included in the longer, only existed in cases of *competition in transportation* to the longer distance point.

(Answer of Jesse M. Smith to interrogatory 9, Record, p. 229; answer of Y. Van Den Burg to cross-questions 88–91, Record, pp. 140, 141; answers of T. S. Davant to cross-questions 17–20, Record, p. 155; answers of J. M. Culp to cross-question 42, Record, p. 168; answer of Joseph M. Brown to cross-questions 20, 21, Record, p. 187; answer of R. E. Lutz to cross-question 17, Record, p. 191; answer of W. A. Winburn to cross questions 17, 18, Record, p. 195; answer of George P. Biles to cross-questions 20, 20½, Record, p. 216).

It is to be presumed that Congress knew this fact, and having this knowledge, that it did not intend that competition in transportation should be an excuse in all cases, but only in certain extreme cases, where, in the language of the Supreme Court, the interests of the public as well as of the carrier demand it.

To hold otherwise would be placing Congress in the absurd position of laying down a rule and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist—in other words, enacting a law and providing at the same time that it should be of no effect.

COMPETITION WHICH AFFECTS RATES NOT CONCLUSIVE.

Counsel for the carriers admits that the "*mere fact of competition*" is not sufficient, but he strenuously contends that under the decision of the Supreme Court in the "Alabama Midland Case," competition which "*affects rates*" is a conclusive ground of exemption from the restraints of sections 3 and 4 of the law.

The Supreme Court, however, does not hold that competition which "affects rates" is *ipso facto* a conclusive defense, and such a construction of its opinion does violence to the language of the court.

The language of the Supreme Court in the "Alabama Midland Case" is that "competition which affects rates is *one* of the matters to be *considered*" (168 U. S., 166); and again, that "competition between rival routes is *one* of the matters which *may* be lawfully *considered* in making rates, and a substantial dissimilarity of circumstances and conditions *may justify* common carriers in charging greater compensation for a shorter than a longer distance over the same line." (168 U. S., 170.)

To hold that a matter may be "*considered*" in the determination of a question is an altogether different thing from holding that it shall conclusively settle that question. To hold that a matter "*may justify*" is a wholly different thing from holding that it *does justify*.

The language of this court, that "competition which affects rates is *one* of the matters to be considered," necessarily implies that there are others.

OTHER MATTERS TO BE CONSIDERED.

Among other matters to be considered are the questions:

(1) Whether the discrimination practiced is not greater than is warranted by the dissimilarity of con-

ditions resulting from competition; in other words, whether the discrimination practiced is not *excessive*.

(2) Why the force of competition at the locality favored by the discrimination is more controlling than at the locality discriminated against—whether this is the result of the *normal* action of the competitive forces at the two localities, or has been brought about by concert or *agreement* between the carriers.

(3) Whether the "*interests of the public*," as well as of the carrier, will be subserved by the discrimination.

INTERESTS OF THE PUBLIC.

The words "interests of the public," as used by this court in the "Alabama Midland Case" and in the "Behlmer Case," of course refer to *legitimate* interests of all portions of the public affected, and not to interests of certain localities created and fostered by favoritism in rates.

It may be that the interests of Nashville, built up by discrimination against Chattanooga, would be injuriously affected by doing away with the existing preferences in rates in favor of that locality and against Chattanooga; but this is not a *legitimate* interest which the law was designed to protect. *It is, on the contrary, a wrong the law was enacted to remedy.*

This court has held, in the case of The Texas and Pacific Railway Company *vs.* The Interstate Commerce Commission (162 U. S., 233), known as the "Import

Case," and in the "Behlmer Case," that consideration must be had of the interests of the community at the locality from which the goods are shipped and the interests of the community at the locality to which the goods are shipped, as well as the interests of the carrier.

We contend—

(1) That no *lawful* interest of Nashville or the carriers will be affected by establishing a just relation between the rates to Nashville and Chattanooga.

(2) That the loss to the shipping points, Baltimore, Philadelphia, New York, and Boston, in trade to Nashville, if any, will be compensated or more than compensated by the increase in trade to Chattanooga.

(3) And that no ultimate loss in revenue to the carriers will result from a reduction of Chattanooga rates, because the tonnage of traffic hauled to Chattanooga will be increased.

It is beyond question that the rightful interests of Chattanooga will be promoted.

CHAPTER IV.

FIRST PROPOSITION.

THE COMPETITION AT NASHVILLE NOT SUFFICIENT, AS MATTER OF FACT, TO JUSTIFY DISCRIMINATION AGAINST CHATTANOOGA.

The first proposition for which we contend in answer to the plea of competition is—

That, as matter of fact, the force of competition on transportation from the eastern seaboard to Nashville is not controlling, or such as affects rates at Nashville to the extent of requiring those rates to be made lower than rates to Chattanooga.

1. We remark, in the first place, that if, as we contend in another branch of this argument, the evidence shows the rates from the eastern seaboard to Nashville are reasonably high, notwithstanding the alleged force of competition at Nashville, then the situation in legal contemplation has not been changed or affected by competition. The carriers could charge no more than reasonably high rates in the absence of competition.

The ground upon which it is claimed that competition justifies lower rates for the longer than the shorter haul

is that it has forced the carriers to charge for the longer haul rates lower than they might otherwise reasonably demand. Competition, therefore, which has left the carriers free to charge reasonably high rates for the longer haul, *which the law itself exacts*, is not such competition as can be plead in justification of discriminations.

LINES INVOLVED IN THIS CASE.

2. The lines involved in this case are from the Eastern seaboard cities—Baltimore, Philadelphia, New York, and Boston—either *all rail* through the country via Hagerstown, Md., or Alexandria, Va., and thence *through Chattanooga* to Nashville, or the *part water and part rail lines* from the Eastern seaboard by steamship to Norfolk, to Charleston, to Savannah, or to Brunswick, and thence by rail *through Chattanooga* to Nashville.

LINE VIA CHATTANOOGA, THE SHORT LINE TO NASHVILLE.

All these lines, whether all rail or rail and water, pass through Chattanooga to Nashville, the haul from Chattanooga to Nashville being over one road alone, the Nashville, Chattanooga and St. Louis. These lines are *the short lines* from the Eastern seaboard, both to Chattanooga and Nashville, and the haul from Chattanooga to Nashville is 151 miles longer than to Chattanooga.

THE "VAST MAJORITY" OF NASHVILLE TRAFFIC FROM THE EAST GOES THROUGH CHATTANOOGA.

On the testimony before the commission, which was taken over ten years ago, the commission found that over 50 per cent, or, in other words, *over half*, of the traffic from the Eastern seaboard to Nashville passed over the lines *through Chattanooga* to Nashville. The circuit court of appeals quoted this finding from the commission, but the undisputed proof before the court is that "*the vast majority* of the traffic from the Eastern seaboard reaches Nashville via Chattanooga." The following is an extract from the testimony of Y. Vandenberg, traffic manager of the Louisville and Nashville Railroad Company, and a witness for the carriers, on this point:

"Q. 10. What proportion of the tonnage from New York and other Eastern cities to Nashville reaches that point via Cincinnati or other Ohio River points, and what proportion of it reaches Nashville *via Chattanooga?*

"A. I do not know that I can give an estimate of that, but *the vast majority of the traffic reaches Nashville via Chattanooga.*"

(Record, bot. p. 126.)

While the shortest line from the Eastern seaboard to Nashville is one of the lines through Chattanooga, and the rule is that *the short line fixes the rates of all other lines between the same termini*, and while "the *vast majority* of the Nashville traffic from the Eastern seaboard passes over the line through Chattanooga," yet it is claimed that the rates by this line are controlled

and fixed by the rates of the lines from the Eastern seaboard *via Cincinnati* to Nashville. *This is the only competition set up in this case.*

CHATTANOOGA AS WELL AS NASHVILLE HAS BENEFIT OF LOW TRUNK-LINE RATES FROM EAST TO CINCINNATI.

It is claimed that Nashville by this competing route has the benefit of low trunk-line rates from the Eastern seaboard to Cincinnati, and counsel for the carriers calls attention to the fact that on traffic transported via Cincinnati to Nashville the same rate is charged to Cincinnati that would be charged if the goods were destined for that city.

It is to be borne in mind, however, that there is also a route from the eastern seaboard via Cincinnati *to Chattanooga*, namely, by the same trunk lines to Cincinnati and thence by the Cincinnati, New Orleans, and Texas Pacific Railway to Chattanooga, and it is equally true that when traffic is transported by this route to Chattanooga the same trunk-line rate is charged to Cincinnati as when the goods are destined for that city.

Chattanooga, therefore, has the benefit of cheap rates by the trunk line from the eastern seaboard to Cincinnati to exactly the same extent as Nashville. The difference in rates as between Chattanooga and Nashville commences at Cincinnati and results from the much higher

rates charged by the Cincinnati, New Orleans and Texas Pacific Railway Company from Cincinnati to Chattanooga than are charged by the Louisville and Nashville Railroad Company from Cincinnati to Nashville. Those rates by the two roads are as follows:

	1	2	3	4	5	6
Cincinnati to Chattanooga	49	41	42	43	34	27
Cincinnati to Nashville	26	21	16	12	10	9

First-class rate per ton, Cincinnati to Chattanooga	$9.80
First-class rate per ton, Cincinnati to Nashville	5.20

The rates from Cincinnati to Chattanooga are, as shown above, about *double* the rates to Nashville on *classes 1 and 2*, and *from two to three times as high as the Nashville rates on the remaining classes.*

The distance from Cincinnati to Chattanooga by the Cincinnati, New Orleans and Texas Pacific Railway is 335 miles, and from Cincinnati to Nashville by the Louisville and Nashville Railroad 295 miles, the former distance being 40 miles in excess of the latter. It is not claimed that this difference in the length of hauls authorizes or accounts for the difference in rates as between Chattanooga and Nashville.

ONLY COMPETITION RELIED ON THAT OF RIVERS FROM CINCINNATI TO NASHVILLE.

The sole contention on the part of the carriers is that the rates of the Louisville and Nashville Railroad

from Cincinnati to Nashville are affected by river transportation from Cincinnati to Nashville, namely, by the Ohio River from Cincinnati to Evansville, and thence by the Ohio and Cumberland rivers to Nashville.

It is urged that this river competition has reduced the rates of the Louisville and Nashville Railroad from Cincinnati to Nashville and that the lines involved in this case from the Eastern seaboard through Chattanooga to Nashville are compelled to meet these rates thus reduced, and that this necessitates or justifies the materially lower rates to Nashville than to Chattanooga.

Reduced to its final analysis, then, the only contention on the part of the carriers is that *river competition* by the Ohio and Cumberland rivers necessitates or justifies the lower rates to Nashville than to Chattanooga.

RIVER LINE DOES NOT AND CAN NOT CONTROL RATES OF RAIL LINE FROM CINCINNATI TO NASHVILLE.

ADVANTAGES OF RAIL ROUTE OVER RIVER ROUTE FROM CINCINNATI TO NASHVILLE.

That the river route via the Ohio and Cumberland rivers from Cincinnati to Nashville can not successfully compete with the rail route via the Louisville and Nashville road, when the rates of the latter are anywhere within the bounds of reason, appears from many facts disclosed by the testimony.

(1) DISTANCE AND TIME.—In the first place, the distance by the Ohio and Cumberland rivers from Cincinnati via Evansville to Nashville is 690 miles (T. M. Gallagher), while the distance by rail (Louisville and Nashville Railroad) is only 296 miles, and the time consumed by rail is only a few hours, while by river it is about two and one-half days from Evansville alone to Nashville, and a week for the round trip, and from Cincinnati to Nashville *six* days, or *twelve* days for round trip. (T. M. Gallagher.)

(2) TRANSFERS.—Eastern seaboard traffic destined to Nashville via Cincinnati and thence by river has to be transferred from the cars at Cincinnati to the Ohio River steamer, transferred again from the Ohio River steamer to the Cumberland River steamer at Evansville. If carried to Evansville by rail, it has to be transferred there from cars to steamer. These transfers, of course, involve delay and expense.

(3) NAVIGABILITY.—The Cumberland River is shown to be navigable by "very light-draft" steamers between Evansville and Nashville only *about* 7½ months a year, and from Paducah to Nashville only 8 to 8½ months a year, *in about six years out of seven.* In about one year out of seven, it is stated, the river is navigable about nine months in the year. This appears from the following testimony of T. M. Gallagher, general passenger and freight agent of the Cumberland River

line of steamers, examined as a witness in behalf of the defendants:

Question 10. (Direct examination.) "During how many months in the year, on an average, is the Cumberland River navigable for the steamboats which ply between Nashville and Paducah and between Nashville and Evansville?"

Answer. "Well, sir, the seasons differ. Sometimes we make fully 8 months to 8½ months between Nashville and Paducah and from 7½ to Evansville. Some seasons we run as long as 9 and 10 months. The weather seems to come around in cycles, and sometimes we hardly haul up the whole season." (Record, p. 172.)

The witness was cross-examined with a view of ascertaining how often the Cumberland River was navigable for 9 and 10 months in the year, as follows:

Cross-question 14. "You state that the Cumberland River was sometimes navigable 9 and 10 months in the year?"

Answer. "Yes, sir."

Cross-question 15. "About how often does that happen?"

Answer. "Well, it comes about every 7 years, we figure it"

Cross-question 16. "During the other years how long is it navigable?"

Answer. "We have 8 months' navigation and 8½ months to Paducah. Business drops out in the Evansville trade along about this time of the year (July 14). However, our boat is running now (July 14) to Evansville. It left to-day at noon (July 14). It is running a little longer than usual."

Cross-question 17. "During the other years how many months is the river navigable from Nashville to Paducah?"

Answer. "It runs about 8 months." (Record, p. 177.)

(4) NO THROUGH RATES AND SHIPMENTS BY CUMBERLAND RIVER.—There are no through rates or shipments from Eastern seaboard cities to Nashville via Cincinnati or via Evansville and thence over the Ohio and Cumberland rivers.

The following is an extract from the testimony of Y. Van Den Burg on this point:

Cross-question 50. "Have you, of your own personal knowledge, ever known of a *through shipment* from New York to Evansville by rail and thence by the Ohio and Cumberland rivers to Nashville?"
Answer. "No, sir." (Record, p. 137.)

On this point T. M. Gallagher, general freight and passenger agent of the River Line, testified as follows on cross-examination:

Cross-question 25. "Are there any *through rates* published from New York and other Eastern cities via Cincinnati and thence via the Ohio and Cumberland rivers to Nashville?"
Answer. "Not that I know of."
Cross-question 26. "Have you ever known of such through rates being published?"
Answer. "No, sir."

(5) NUMBER OF BOATS ON CUMBERLAND RIVER—WEEKLY TRIPS.—The witness, T. M. Gallagher, stated on direct examination that there were two lines of steamers on the Cumberland River, owning 5 boats. On cross-examination he testified that these two lines, the Paducah and Evansville lines, were under one

and the same ownership, and that *only one steamer plied between Nashville and Paducah and only one between Evansville and Nashville*, and that the steamer from Paducah to Nashville made two trips a week and the steamer from Evansville to Nashville only one trip a week. The following is his testimony on this point on cross-examination:

Cross-question 5. "One steamer plies, I understand you to say, between Nashville and Paducah?"
Answer. "Yes, sir."
Cross-question 6. "And makes two trips a week?"
Answer. "Two trips a week."
Cross-question 7. "Two round trips?"
Answer. "Two round trips."
Cross-question 8. "And one plies between Evansville and Nashville?"
Answer. "Yes, sir."
Cross-question 9. "And makes one trip a week?"
Answer. "Yes, sir."
Cross-question 10. "One round trip?"
Answer. "Yes, sir."
Cross-question 11. "Those are the only two boats that ply between Nashville and Paducah and Nashvile and Evansville?"
Answer. "Yes, sir."
(Record, p. 176.)

While the steamboat between Paducah and Nashville makes only two round trips a week and the steamboat from Evansville to Nashville makes only one round trip a week, the *rail lines have many trains daily, each of a tonnage capacity equal to or greater than that of the steamers on the Cumberland.*

(5) ADVANTAGES OF RAILROADS.—The all-rail lines from New York and other Eastern cities *via* Cincinnati to Nashville have the advantage over the part-rail and part-water line:

First. In that their traffic is hauled through from New York to Nashville *in carloads and in the same cars in which they are loaded at New York* and such other Eastern cities *without transfer or breakage of bulk. There is no charge for transfers, lighterage, or wharfage by the all-rail lines.*

Second. In the saving of TIME, which is an element of great importance in commercial transactions.

Third. In the matter of RISK. River transportation is notoriously more hazardous than transportation by rail. Goods transported by rivers are INSURED, while by all rail they are not.

(Testimony of T. M. Gallagher.)

Fourth. Rivers are circuitous, while rail lines are direct, and hence rail lines have the advantage over river lines in the matter of distance.

Fifth. Rail lines have also an advantage over river lines, in that the former have a MONOPOLY over their own roadbeds and rails, while rivers and navigable

bodies of water are public highways, open to all ships and steamers. Rail lines are not, therefore, subject to competition to the same extent that river lines are.

In consequence of these and other advantages possessed by rail lines over river or water lines the business of the river lines on long through hauls between termini served by rail lines has become insignificant, if it has not entirely ceased. The witness T. M. Gallagher having been asked if this was not the case, could name but one exception, and that was a barge line handling grain on the Mississippi River from St. Louis to New Orleans. On this point his testimony is as follows on cross-examination:

Cross-question 53. "Since railways have come into existence has not the business of the river lines on through hauls almost entirely ceased?"

Answer. "Except to some places. From St. Louis to New Orleans they have competition there with the railroads. I do not think the railroads will ever be able to overcome that. That is a barge line out of St. Louis handling grain out of St. Louis." (Record, p. 180.)

He further testified as follows:

Cross-question 28. "Notwithstanding the very much higher rate by rail from Evansville and Cincinnati to Nashville than by water, the railroads do almost the entire through business, do they not?"

Answer. "Yes, sir."

Cross-question 29. "And for how many years has that been the case, or about how many years?"

Answer. "I think about 15 or 16 years."

Cross-question 30. "Notwithstanding the compara-

tively low rates which you charge, then, the railroads still do the business?"

Answer. "Yes, sir. The shippers seem to give them the preference." (Record, p. 178.)

In this connection the following extract from the opinion of Judge Severens in this case is in point:

"The delays, hazards, and uncertainties which attend the navigation of such rivers as the Cumberland River have induced shippers to greatly prefer and to rely upon transportation by rail, and the carriage of freight by the navigation of such streams has been almost entirely discontinued in recent years." (Record, p. 372.)

NASHVILLE COAL RATE CASE. WITNESSES FOR CARRIERS IN THAT CASE TESTIFY THAT RIVER LINE TO NASHVILLE CAN NOT COMPETE WITH RAIL LINE.

The Nashville coal rate case involved rates on coal from the western Kentucky coal mines to Nashville and Memphis, respectively. The Louisville and Nashville road charged as high a rate on coal for 105 miles haul to Nashville as for to 265 miles haul to Memphis. In justification of this discrimination, the Louisville and Nashville road set up competition over the Ohio and Mississippi rivers in the transportation of coal from Pittsburg to Memphis.

Not only was competition by the Cumberland River ignored in the "Nashville Coal Rate Case," but proof was introduced by counsel for the Louisville and Nashville road (Mr. Baxter) showing that such competition

was impracticable, as appears from the following testimony (stipulated into this case) of John B. Atkinson, a witness for the road in that case:

Question 7. "Does any considerable quantity of coal now come to Nashville by river, and if not, why not?"

Answer. "I think no coal comes to Nashville by river at this time. *The expense of river transportation, with its attendant losses, drove the river coal from the market, not being able to compete with the railroad coal.*" (Record, p. 366.)

If river transportation can ever compete successfully with rail transportation, it is in the carriage of weighty and bulky traffic, of comparatively small value per weight, which can be hauled in light-draft barges, such as coal, grain, etc.

RAIL RATES THREE TIMES AS HIGH AS RIVER RATES, AND YET THE RAIL LINES GET THE BUSINESS.

Conclusive proof that the river line from Cincinnati to Nashville does not control or materially affect the rates by the rail line is furnished by the fact that the rail rates are three times as high as the rates by the river line, and yet the railroads get the traffic.

If transportation by the river line had any material influence on the rail rate, it is evident it would reduce the rail rate to the river rate or cause it to approximate the river rate.

T. M. Gallagher testified as follows on cross-examination:

Cross-question 21. "You have stated that the rates which your steamer lines were willing to accept from Evansville to Nashville were very much lower than the rates charged by the railroads?"

Answer. "Yes, sir."

Cross-question 22. "Are the rates which you charge from Paducah and Evansville very much lower than the rail rates from those points to Nashville?"

Answer. "I think they are."

Cross-question 23. "I think you said your highest rate was 10 cents per hundred pounds and your lowest 6?"

Answer. "Yes, sir. *The highest we have received on any shipping freight coming from Evansville brought to us by the railroads there in connection with our boats was 10 cents a hundred, and we have brought it as low as 6 cents a hundred.*"

Cross-question 28. "*Notwithstanding the very much higher rate by rail from Evansville and Cincinnati to Nashville than by water the railroads do almost the entire through business, do they not?*"

Answer. "*Yes, sir.*"

Cross-question 29. "And for how many years has that been the case, or about how many years?"

Answer. "I think about 15 or 16 years."

(Record, pp. 177, 178.)

RIVER RATES.—Highest river rate from Evansville to Nashville, 10 cents.

Lowest river rate from Evansville to Nashville, 6 cents.

Rail rates from Evansville to Nashville.

	Cents.
Class 1	38
Class 2	33
Class 3	28
Class 4	23

	Cents.
Class 5	18
Class 6	15

Average of river rates, 8 cents.

Average of rail rates, 26 cents.

Another significant fact, to which the circuit court of appeals forcibly alludes in its opinion in this case, is that the local rates of the Louisville and Nashville road from Cincinnati to Nashville are about twice as high as the rate which it charges on through shipments from the Eastern seaboard for its portion of the haul from Cincinnati to Nashville. These rates are shown in the table below:

	1.	2.	3.	4.	5.	6.
Local rate, Cincinnati to Nashville	53	46	39	31	25	25
Additions to trunk-line rate to Cincinnati	26	21	16	12	10	9

The local rates, then, charged by the Louisville and Nashville Railroad on local business originating at Cincinnati and terminating at Nashville is over three times as high as the average river rate, but nearly all the local business from Cincinnati to Nashville goes by rail.

We here quote as part of our argument what is said by the circuit court of appeals on this point, in its opinion in this case.

"Now, the local railway rates to Nashville from Ohio River points are about 50 per cent higher than the through

rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga, the Louisville and Nashville Company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum it is clear that any increase on through rates, under which they would still be less than local rates, can not affect river competition at all. In other words, *the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elect to bring about the equality enjoined in the order by increasing the Nashville rate to the Chattanooga rate.* We may, therefore, eliminate Cumberland River competition as a factor in reaching our conclusion."

(Record, p. 411.)

CHAPTER V.

FIRST PROPOSITION CONTINUED.

RATES OF LOUISVILLE AND NASHVILLE RAILROAD FROM CINCINNATI TO NASHVILLE PROVEN TO BE NOT "UNREASONABLY LOW," NOTWITHSTANDING RIVER COMPETITION.

COMPETITION WHICH ONLY RESULTS IN REASONABLE RATES, WHICH THE LAW ITSELF EXACTS, NO JUSTIFICATION FOR DISCRIMINATION.

RIVER TRANSPORTATION CAN ONLY COMPETE WITH RAIL TRANSPORTATION WHEN RAIL RATES ARE EXCESSIVE.

Counsel for the carriers made proof, by T. S. Davant, that "the proportions which the Louisville and Nashville Railroad received from Cincinnati to Nashville on freight from New York *were about the same per ton per mile as the trunk-line rates from New York to Cincinnati*," and that neither the trunk-line rates from New York to Cincinnati nor the Louisville and Nashville rates from Cincinnati to Nashville were unreasonably low.

This proof is contained in the following extract from the testimony, on redirect examination by counsel for

the carriers, of T. S. Davant, general freight agent of the Norfolk and Western Railroad Company:

Question 1. "Are not the rates from New York to Nashville made by the trunk lines to Cincinnati and thence by the Louisville and Nashville Railroad to Nashville?"

Answer. "Yes, sir."

Question 2. "Do you regard the trunk-line rates from New York to Cincinnati as unreasonably low?"

Answer. "No, sir."

Question 3. "Are not the proportions which the Louisville and Nashville Railroad receives from Cincinnati to Nashville on freight from New York the same per ton per mile as the trunk-line rates from New York to Cincinnati?"

Answer. "I can not answer that question definitely, but it is my information that they are on that basis."

Question 4. "Then, if the trunk-line rates per ton per mile from New York to Cincinnati are not unreasonably low, do you think that the Louisville and Nashville proportions from Cincinnati to Nashville are unreasonably low?"

Answer. "No, sir."

(Record, p. 155.)

Rates which are not "unreasonably low" must be reasonably high. This proof, then, shows that the rates of the Louisville and Nashville road from Cincinnati to Nashville on Eastern seaboard traffic are reasonably high. *Therefore river competition by the Ohio and Cumberland rivers from Cincinnati, or from Evansville to Nashville, if it has had any effect on the rail rates of the Louisville and Nashville road between those cities, has only held them down to a legitimate or reasonably high*

basis, and has prevented that road from charging unreasonably high rates.

The only competition by the Cumberland River possible is that which would be brought into operation by excessive or *prohibitory* rail rates. *If the flow of commerce is diverted from its natural channel by excessive or prohibitory rates, it will, like water, seek outlet by any other available route.*

As said in the preceding chapter, carriers have no right to charge rates that are more than reasonably high. In the absence of this river competition, the law, if enforced, would have held the Louisville and Nashville road down to reasonably high rates. It may be safely affirmed that water competition, which results only in forcing carriers to charge reasonable rates, which the law itself exacts, is not such competition as can be plead in justification of discriminations.

The carriers could charge no more in the absence of such competition. The situation in legal contemplation, then, has not been changed or affected by competition.

Again, if the rate per ton per mile from Cincinnati to Nashville is the same as the trunk-line rate per ton per mile to Cincinnati, then it would appear highly improbable, to say the least, that the rate from Cincinnati is controlled by river competition.

WHEN THE RAIL RATES FROM CINCINNATI OR EVANSVILLE TO NASHVILLE ARE NOT EXCESSIVE, BUT ONLY REASONABLY HIGH, IT WOULD APPEAR, FROM THE FACTS TESTIFED TO BY WITNESSES FOR THE CARRIERS, SET FORTH IN THE PRECEDING CHAPTER, TO BE IMPOSSIBLE THAT RIVER TRANSPORTATION BY THE OHIO AND CUMBERLAND RIVERS BETWEEN THOSE POINTS COULD SUCCESSFULLY COMPETE WITH RAIL TRANSPORTATION.

CHAPTER VI.

SECOND PROPOSITION.

FACTORS OR ELEMENTS OF COMPETITION GREATER AT CHATTANOOGA THAN AT NASHVILLE.

Our second answer to the plea of competition is—

That the factors or elements of competition in transportation from the Eastern seaboard cities to Chattanooga are many times greater than on such transportation to Nashville, and that, therefore, under *normal* conditions the competition should be greater at Chattanooga than at Nashville.

A competitive point may be defined to be a point for the carriage of traffic to which two or more lines of transportation do or may compete. *Ordinarily it would appear that the greater the number of competing lines reaching a locality the greater would be the force competition to that locality.*

The case of the Interstate Commerce Commission *v.* The Alabama Midland Railway Company et al., known as the Alabama Midland Case, involved rates from the Eastern seaboard cities to Troy, Ala., as the shorter distance point, and for the haul through Troy to Montgomery, Ala., as the longer distance point, and all three courts—this court, the circuit court of appeals,

and the circuit court—emphasize in their opinions as material, if not controlling, as justifying the lower rates to Montgomery than to Troy, the fact that there were "many more lines of railway running to Montgomery than to Troy." (168 U. S., 171; 69 Fed. Rep., 327; 41 U. S. Appeals, 453.)

This court in its opinion, quoting from the decisions of the courts below, says:

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. * * * *There are many more railroad lines running from and to Montgomery* connecting with all the distant markets."

The situation in this respect in the present case is exactly the reverse of that thus stated by this court to have been the situation in the Alabama Midland case. Only two roads having connection with lines to the eastern seaboard actually run into Nashville, the longer-distance point—the Louisville and Nashville and the Nashville, Chattanooga and St. Louis railways; while nine distinct roads or lines of railway having connection with lines to the eastern seaboard actually run into Chattanooga, the shorter-distance point.

These nine roads are as follows:

1. The Nashville, Chattanooga and St. Louis Railway, which runs from Chattanooga to Nashville, where it

connects with the Louisville and Nashville road and forms a line to eastern seaboard cities, either via Cincinnati on the north, or via Memphis and thence by water, or via New Orleans and thence by water, or via the South Atlantic ports—Brunswick, Charleston, Savannah, and Norfolk—to eastern seaboard cities, or via all-rail lines connecting with the Louisville and Nashville road.

2. The Memphis and Charleston road, which runs from Chattanooga to Decatur, where it connects with the Louisville and Nashville and forms lines in both directions, and thence on to Memphis, where it connects with the Mississippi River and forms a line thence via New Orleans.

3. The Alabama Great Southern road, which runs from Chattanooga to Birmingham, where it connects with roads running to New Orleans, forming a line thence by Gulf and ocean, and to Atlanta, forming numerous lines thence by the South Atlantic ports and thence by ocean, or from Atlanta by numerous all-rail lines through Bristol, Alexandria, and Norfolk.

4. The Chatanooga Southern Railway, from Chattanooga to Gadsden, where it connects with a number of other roads, and forms various lines, all rail or rail and water.

5. The Chattanooga, Rome and Columbus road, which runs from Chattanooga to Rome, where it connects with various rail lines running through Atlanta to the South Atlantic ports and on to Carrollton, where it connects with the Central of Georgia system and thence forms various lines, rail and water, via the South Atlantic ports or all rail.

6. The Southern Railway (south of Chattanooga), which runs from Chattanooga via Rome to Atlanta and there connects with the numerous lines, either all rail or rail and water, via the South Atlantic ports.

7. The Western and Atlantic Railroad from Chattanooga to Atlanta direct, where it connects and forms lines with the various lines, all rail or part rail and part water, via the South Atlantic ports.

8. The Southern Railway (east of Chattanooga), which runs from Chattanooga via Knoxville to Bristol, and thence forms lines, all rail through Hagerstown or Alexandria, or rail and water via Norfolk.

9. The Cincinnati, New Orleans and Texas Pacific Railway, which runs from Chattanooga to Cincinnati, where it connects with the trunk lines to the East.

LOUISVILLE AND NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY UNDER THE SAME CONTROL AND OWNERSHIP.

Furthermore, it appears that those two roads which enter Nashville are practically under one control. It is agreed (Record, p. 258) between counsel for both sides in this case that the capital stock of the Nashville, Chattanooga and St. Louis Railway is represented by 100,000 shares of $100 each, aggregating $10,000,000; that a majority of these shares, to wit, 55,005, was purchased for the Louisville and Nashville Railroad Company, March 1, 1882, and that that company still has the legal title thereto, and for the fiscal year ending June 30, 1896, received as dividends on account of this stock $220,000; and that the affairs of the Nashville, Chattanooga and St. Louis Railway Company are managed by a board of directors consisting of 15 members, who are chosen by the stockholders from their own body, and that in all elections for directors each share of stock is entitled to one vote.

As the Louisville and Nashville Railroad Company owns a majority of the shares of stock of the Nashville,

Chattanooga and St. Louis Railway, and as each share is entitled to one vote, and the directors of the Nashville, Chattanooga and St. Louis Railway Company, who manage the affairs of said company, are elected by the stockholders, *the Louisville and Nashville Railroad Company can elect a majority or all of those directors, and thus manage or absolutely control the affairs of the company.*

It is true, it is stipulated that a number of the officials of that company would testify that the two companies are distinct in their management, and that they are actual and *bona fide* competitors for all traffic from Eastern seaboard cities destined to Nashville; *but it is manifest that the Louisville and Nashville, by its ownership of a majority of the stock of the other company and by its power in virtue of such ownership to select all the directors who manage the affairs of that company, can control the competition between the two companies and restrain it when it becomes injurious to the interests of the Louisville and Nashville Railroad Company.*

The question will naturally arise, *Why did the Louisville and Nashville Railroad Company acquire the legal title to a bare majority of the capital stock of the Nashville, Chattanooga and St. Louis Railway Company, except for the purpose of securing control of the affairs of that company with a view to the promotion of the interests of the Louisville and Nashville Railroad Company?*

THEY CERTAINLY DID NOT BUY THE STOCK SIMPLY AS AN INVESTMENT.

We give below as part of our argument what is said by the circuit court of appeals in its opinion in this case on this point:

"We know that it is stipulated in the record that the officers of the Nashville, Chattanooga and St. Louis Railway Company would testify that it competes with the Louisville and Nashville Railroad Company, and that they are under different managements; but *such evidence must be weighed in the light of the history of railroads in this country and the motives that ordinarily govern in railroad management. One railroad company acquires the controlling interest in another company to control its general policy*; and while it may permit independence in the personnel and the details of management, it needs more than a stipulated statement of this general nature to induce a belief that the company which elects the directors of the other will permit that other to take a course materially detrimental to the interests of the owning company."
(Record, pp. 414, 415.)

The nine roads entering Chattanooga constitute about five distinct systems, three of those roads being in the Southern Railway system, and the Nashville, Chattanooga and St. Louis Railroad being lessee of the Western and Atlantic. *There are five systems of railway entering Chattanooga, against one entering Nashville.*

On the transportation of traffic, therefore, from the Eastern seaboard via Cincinnati to Chattanooga, the

Cincinnati, New Orleans and Texas Pacific Railway meets at Chattanooga, or under normal conditions should meet, the competition of five systems of railway, whereas on such transportation from Cincinnati to Nashville the Louisville and Nashville roads *meet the competition of but one road alone, and that road is subject to its control. It virtually meets no competition at all.*

Witnesses for the roads have exhausted their ingenuity in forming lines from Eastern seaboard cities to Nashville and have encumbered the record with statements of those lines. For example, George R. Knox, general freight agent of the Nashville, Chattanooga and St. Louis Railway, was asked by counsel for the roads, on direct examination, the following question:

> Question 11. "Please state each route—whether rail, water, or rail and water—which actually competed in 1892 for the transportation of freight from New York and Boston, *via Chattanooga*, to Nashville."
> (Record, p. 198.)

It will be noted that the question relates only to routes "*via Chattanooga*" to Nashville, and the witness in answer names 40 different routes, covering 8 pages of the record, from page 198 to page 205. As all those routes are *via Chattanooga* to Nashville, they *must all come to Chattanooga* before reaching Nashville. *Therefore all these 40 routes, covering 8 pages of the record,*

are routes to Chattanooga as well as to Nashville, and these routes to Chattanooga are all 151 miles shorter than to Nashville.

It was not deemed necessary to encumber the record with the vast number of routes or lines, all rail or rail and water, which might be formed from the Eastern seaboard cities, Boston and New York, to Chattanooga by combinations with the nine roads whose rails enter Chattanooga. If forty combinations or routes can be formed from those cities via Chattanooga to Nashville with only *two* roads entering Nashville, it is difficult to compute the number of combinations or routes which might be formed with the *nine* roads entering Chattanooga. The number, it is manifest, would be much greater to Chattanooga than to Nashville, and would occupy a much larger space in the record.

We naturally conclude, therefore, that if the degree of competition depends upon the number of competing lines, the competition is many times greater to Chattanooga than to Nashville.

CHAPTER VII.

SECOND PROPOSITION CONTINUED.

COMPETITION CONTINUED—COMPETITION BY CUMBERLAND RIVER FROM EVANSVILLE TO NASHVILLE MORE THAN OFFSET BY OCEAN COMPETITION ON ROUTE VIA SAVANNAH AND CHARLESTON TO CHATTANOOGA—COMPETITION BY TENNESSEE RIVER.

We have shown in Chapters IV and V *supra* that competition by the Ohio and Cumberland rivers is of no controlling force as to traffic shipped from Eastern seaboard cities *via* Cincinnati to Nashville, and that *in the nature of things it can not "effect rates" on direct rail lines so long as those rates are reasonable and not excessive.*

If, however, competition by the Cumberland River was of controlling force, it is more than offset by the ocean competition from New York and other Eastern seaboard cities on the route from those cities via Charleston, Savannah, and other south Atlantic ports, to Chattanooga.

As said by Judge Severens:

"The rail portion of the route via Cincinnati to Nashville is very much greater than that of the route to Chatta-

nooga when the transportation is partly by rail and partly by water." (Record, p. 377.)

This is seen from the distances below:

	Miles.
Distance by short-rail line from Savannah to Chattanooga.	418
Distance by short-rail line from Charleston to Chattanooga.	447
Distance by short-rail line from New York to Cincinnati...	757
Distance by short-rail line from New York to Evansville...	1,019

It is a universally recognized fact that ocean transportation from New York and other Eastern cities to Charleston, Savannah, and other South Atlantic cities, is the great dominating or controlling factor in the making of rates on Eastern traffic to interior points, like Chattanooga, in all this Southern territory.

Chattanooga is 151 miles nearer this ocean competition than Nashville.

In this connection the following from the opinion of Judge Severens is *apropos:*

"*Chattanooga is so much better situated in its relation to the Eastern ports, if it is allowed the legitimate benefit of competition by water transportation,* that it is very difficult to find any just reason why the charges to that place should be so out of proportion to those at Nashville. *Chattanooga, too, has more railroads.* They might compete there if they would. They do not think it to their interest to do so. And thus it is that Chattanooga, *with a location nearer to the Eastern seaboard ports* and having many more railroads than Nashville, is yet denied the benefit of that advantage by reason of the

competition at Nashville of one railroad with the *navigation of the Cumberland River, an element of trifling importance when compared with the transportation by sea on the route to Chattanooga.* The natural advantages greatly favor the latter place." (Record, p. 377.)

COMPETITION BY TENNESSEE RIVER.

Competition by the Tennessee River to Chattanooga is *potential* the year round. (See testimony of Magill, Payne, Snow, Dobbs, Merriam, in answer to interrogatory No. 24, Record, pp. 243, 245, 247, 250, 253.)

R. E. Lutz, a witness for defendants, testifies that—

"There is water competition *via* the Ohio and *Tennessee* rivers" to Chattanooga, and "*not an impracticable* route for business from Cincinnati to Chattanooga is *via* the Ohio and Mississippi rivers to Memphis and thence *via* the Memphis and Charleston Railroad." (Record, p. 192.)

CHAPTER VIII.

SECOND PROPOSITION CONTINUED.

FACTORS OF COMPETITION AT CHATTANOOGA AND NASHVILLE, RESPECTIVELY, STATED IN PARALLEL COLUMNS.

AT CHATTANOOGA.	AT NASHVILLE.
1.	1.
Nine railroads, constituting *five* systems, enter Chattanooga and form parts of lines to Eastern seaboard cities.	*Two* railroads, practically *one system*, enter Nashville and form parts of lines to Eastern seaboard cities.
2.	2.
On route from Eastern seaboard cities *via Cincinnati* to Chattanooga, *low trunk-line rates to Cincinnati.*	On route from Eastern seaboard cities via Cincinnati to Nashville, *low-trunk line rates to Cincinnati.*
3.	3.
Cheap ocean transportation from Eastern seaboard cities to Charleston, Savannah, and other South Atlantic ports. *Rail portion* of the route to Chattanooga via Charleston and Savannah *much less than rail* portion of route via Cincinnati and Ohio and Cumberland rivers to Nashville.	Cumberland River, navigable by very *light-draft boats* about eight months in the year. River rates *less than one-third* of rail rates, but the traffic goes by rail. *Rail portion* of the route to Nashville via Cincinnati and the Ohio and Cumberland rivers *much greater* than rail portion of route to Chattanooga via Charleston and Savannah.

At Chattanooga—Cont'd.	At Nashville—Cont'd.
4.	
Distance by short rail line and by the lines via Charleston and Savannah from Eastern seaboard cities to Chattanooga, *151 miles less* than to Nashville. *Distance* by above lines to Chattanooga, *305 miles less* than by line via Cincinnati to Nashville.	
5.	
Low rail rates on rail lines in Eastern territory north of the Potomac.	
6.	
Tennessee River.	

Judge Severens thus forcibly sums up the relative competitive advantages of Chattanooga and Nashville:

"Chattanooga is so much better situated in its relation to the Eastern ports, if it is allowed the legitimate benefit of competition by water transportation, that it is very difficult to find any just reason why the charges to that place should be so out of proportion to those at Nashville. Chattanooga, too, has more railroads. *They might compete there if they would. They do not think it to their interest to do so. And thus it is that Chattanooga, with a location nearer to the Eastern seaboard ports, and having many more railroads than Nashville,* is yet denied the benefit of that advantage by reasons of the competition at Nashville of one railroad with the navigation of the Cumberland River, an element of trifling impor-

tance when compared with the transportation by sea on the route to Chattanooga. The natural advantages greatly favor the latter place. In my opinion, the faculty of rate making has here completely frustrated the law. *The scope of the statute is universal, and all the public in every part of the country is entitled to enjoy its benefits. Nor is it a piece of shreds and patches with large rents for great mischief to flourish in.*" (Record, p. 377).

The material fact is that the elements of competition are greater at Chattanooga than at Nashville. If competition does not in fact exist at Chattanooga to the same extent as, or a greater extent than, at Nashville, *this must be the result of concert or agreement between the carriers.* They can not be allowed to set up their own wrongful action in justification of discriminations against Chattanooga; in other words, they can not be allowed to "TAKE ADVANTAGE OF THEIR OWN WRONG."

As shown in the following chapter, the rates to Chattanooga are fixed by agreement between the carriers, and this agreement has stifled the NORMAL force of competition at Chattanooga.

CHAPTER IX.

THIRD PROPOSITION.

RATES TO CHATTANOOGA MADE BY AGREEMENT.

COMPETITION THUS STIFLED.

If, as we have shown, the factors of competition on transportation from the eastern seaboard to Chattanooga are greater than on such transportation to Nashville, the question arises, *why this competition at Chattanooga is not effective or controlling so as to make the Chattanooga rates at least as low as, if not relatively as well as absolutely, lower than the Nashville rates?*

This brings us to the consideration of our third proposition in answer to the plea of competition, namely:

That the rates to Chattanooga by all routes from the eastern seaboard have been for a long period of time and are now established by *agreement* between the carries as members of associations of Southern railway and steamship companies; that this agreement fixing the rates has restrained or stifled normal competition at Chattanooga and prevented the reduction of the Chattanooga rates, and that the dissimilarity of conditions thus brought about by the agreement of the carriers can not justify discrimination.

In the use of the words, "under substantially similar circumstances and conditions," the law has regard to

normal conditions and not to an artificial or abnormal situation brought about by agreement between the carriers.

In this connection we quote as part of our argument what is said on this subject by the circuit court of appeals in its opinion in this case:

"The evidence shows that the rates to Chattanooga from Cincinnati and from the eastern seaboard have always been fixed and agreed upon by an association of the Southern railway and steamship companies. * * * Without such an agreement it is not possible to see why *normal* competition would not give Chattanooga substantially the same rates as Nashville * * * It is not in accord with the spirit and letter of the law to recognize as a condition justifying discrimination against one locality competition against a more distant locality when competition at the nearer point is stifled or reduced, not by *normal* restrictions, but by agreement between those who otherwise would be competing carriers. The difference in conditions thus produced is affected by a restraint upon trade and commerce, which is not only violative of the common law but of the so-called antitrust act." (See opinion of circuit court of appeals.)

(Record, pp. 412–414.)

This court has held in the case known as the "Joint Traffic Case" (171 U. S., 505) that when carriers come together and agree upon the rates to be charged by them, *those rates will be higher than rates which are the result of active competition. This proposition is the basis of the decision of the court in that case.*

In that case, in speaking of the agreement in the Trans-Missouri Case (166 U. S., p. 209) and of the agreement in the Joint Traffic Association Case, this court says:

"The natural and direct effect of the two agreements is the same, viz, *to maintain rates at a higher level than would otherwise prevail.*" (171 U. S., 565.)

And again:

"The agreement" (Joint Traffic Association agreement) "*affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.*" (171 U. S., 569.)

And again, the court speaks of the Joint Traffic Association agreement as one made—

"For the purpose of *stifling competition* among themselves" (the competing lines), "and of thus keeping their rates and charges higher *than they might otherwise be under the laws of competition.*" (171 U. S., 571.)

We thus have the sanction of this court for our proposition, that, where rates are fixed by agreement, they will be higher than rates which might be produced under the laws of competition, and it is equally true that a discrimination in rates thus brought about can not be justified under the law.

Chapter X.

FOURTH AND FIFTH PROPOSITIONS.

DISCRIMINATION SHOULD NOT BE IN EXCESS OF WHAT IS WARRANTED BY THE DISSIMILARITY OF CONDITIONS. DISCRIMINATION IN THIS CASE EXCESSIVE.

THE INJURY RESULTING FROM THE DISCRIMINATION IN THIS CASE FALLS WITHIN THE EVIL THE LAW WAS INTENDED TO REMEDY. COMPETITION SHOULD NOT BE HELD TO JUSTIFY THE WRONGS THE LAW WAS DESIGNED TO PREVENT.

TESTIMONY OF CHATTANOOGA MERCHANTS SHOWING INJURY RESULTING FROM THE DISCRIMINATION PRACTICED.

Our fourth and fifth propositions in answer to the plea of competition are germane and may be considered together. They are as follows:

Fourth. That even where some discrimination is justifiable because of the greater force of competition at the locality in favor of which the discrimination is made, the discrimination actually practiced may be in excess of what is warranted by the dissimilarity of conditions, and that in this case *the discrimination is excessive.*

Fifth. That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discrimination practiced against Chattanooga and in favor of Nashville, *brings the case within the evil which the act to regulate commerce was designed to remedy and that competition, no matter how forceful, should not be held to nullify the law itself—in other words, should not be held to justify the very wrong which the law was enacted to remedy.*

EXTENT OF THE DISCRIMINATION MUST NOT EXCEED WHAT IS WARRANTED BY THE DISSIMILARITY OF CONDITIONS.

It is manifest that although a substantial dissimilarity of condition resulting from competition may exist, the extent of the discrimination may be in excess of what is warranted by such dissimilarity of condition.

In his opinion in this case Judge Severens says on this point:

"The restraint of section 4 is to be applied upon the scale of comparison between dissimilarity of conditions and the disparity of rates, and it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, *provided the dissimilarity is not so great as to justify the discrimination made.*" (Record, p. 379).

The language of section 3, "*undue or unreasonable* prejudice or disadvantage," necessarily calls for a measurement or consideration of the extent of the injury or prejudice resulting from the discrimination. The language *ex vi termini* imports or requires *measurement.*

WHEN UNDER INVESTIGATION, COURTS OR COMMISSION MUST DETERMINE THE MATTER.

It is equally manifest that the determination of the amount or extent of the discrimination which may be practiced is not to be left to the carrier *where the matter is under judicial investigation.*

If carriers are to determine the extent of the discrimination a dissimilarity of condition in a given case may justify, then, whenever such dissimilarity is shown, the case is taken from under the law, and neither courts nor commission have the power to interfere, and carriers are left at liberty to practice discrimination to any extent they please over and above the amount justified by the dissimilarity of condition.

In this connection the following extract from the opinion of Judge Severens is apropos:

"The argument of counsel for the carriers is in effect that the *extent* of the discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task. If this be so, there is nothing for the Commission or the court to do but to take notice of the fact that the conditions are dissimilar, and abandon all further inquiry. *It is fundamental that no such proposition as this can be admitted.*"

(Record, pp. 377, 378.)

And again, Judge Severens says:

"It must happen that judges and juries who are called to decide such questions are much less familiar with the

details of the business and the requirements of railroad management than those who, from many years' experience, have become expert in such matters; *but there is a necessity that such questions be decided, and the courts and juries are delegated to decide them, however much of skill and experience may be involved in the controversy or the solution of it.*" (Record, p. 374).

In the opinion of the circuit court of appeals in this case it is said:

"It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates and to decide what discriminations are justified by the circumstances than the courts. This can not be conceded so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the Federal court. *Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute.*" (Record, p. 415.)

In the "Alabama Midland case," counsel for the Commission contended before this court that in certain extracts from its opinion in that case the circuit court of appeals held in effect that "the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers." In answer to that contention of counsel for the Commission this court says:

"If so read, we should not be *ready to adopt or approve such a position.* But we understand the statement, read

in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust rates to suit such dissimilarity of circumstances and their conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. *But it does not mean that the action of the carriers, in fixing and adjusting the rates in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences.*" (168 U. S., p. 173.)

In the concluding clause of the proviso to the fourth section of the law the authority is expressly conferred upon the Commission to prescribe the *extent* of the discrimination which may be justified under that section, as follows:

"The Commission may from time to time prescribe the *extent* to which designated common carriers may be relieved from the operation of this" (fourth) "section of the act."

Carriers must, it is true, *in the first instance* determine the *extent* of the discrimination justified by a dissimilarity of conditions, *but when their action in this regard is under judicial investigation, their determination of the question can not be held to be conclusive.*

The maxim of the law is that no man shall be judge in his own case (*nemo debet esse judex in propria causa*).

The claim of counsel for the carriers is in effect that they should be exempt from this rule and be judges in their own cases. It might as well be said where a party is sued for a debt that he, being conversant with all the facts and circumstances relating to the alleged indebtedness, is therefore better qualified than any court or jury to determine whether there is any indebtedness, and if so, the amount of it.

HOW IT IS TO BE DETERMINED WHETHER THE DISCRIMINATION IN A GIVEN CASE IS EXCESSIVE. ONE TEST, THE EXTENT OF THE INJURY INFLICTED ON THE LOCALITY DISCRIMINATED AGAINST.

The question arises how are the courts (or the Commission) to determine whether the discrimination in a given case is or is not excessive. We think one of the tests is *the extent of the injury* resulting to the locality, or that portion of the public, discriminated against.

Discrimination is claimed to be justified only on the ground that it is necessary to enable the carrier making the discrimination to meet competition and thus retain competitive traffic. In determining the extent to which a carrier may thus go in protecting *its own interest* we should apply the maxim of the law, "*so use your own that you do not injure the interest of another*" (*sic utere tuo ut alienum non laedas*).

Under this maxim a private citizen may use his own private property for his personal benefit only to the

extent that he can do so without inflicting material injury on others.

A fortiori is this true with reference to a quasi-public corporation, like a common carrier, which derives, in the language of this court in the Goodrich case, its franchise or "its right to exist" from the public, and we here remark that, if there should be a conflict between the interests of the public and of the carrier, that of the public should be held to be paramount.

As we have heretofore shown, this court has held in the "Alabama Midland case," in the "Social Circle case," and in the recently decided "Behlmer case," that the right to discriminate because of competition is, in the language of this court in the Behlmer case, "*in every event to be enjoyed with due regard to the interests of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered.*"

EXTENT OF THE INJURY TO CHATTANOOGA FROM DISCRIMINATION IN FAVOR OF NASHVILLE, SHOWN BY TESTIMONY OF CHATTANOOGA MERCHANTS.

In determining, therefore, whether discrimination is justified to the extent shown, it is proper to consider the effect of that discrimination on the locality discriminated against. *For this purpose we call the attention of the court to the injury which has resulted to Chattanooga*

from the discrimination in rates against that city and in favor of Nashville, as shown by the testimony of leading Chattanooga merchants in all lines of business.

It appears, in the first place, from the testimony of those merchants, that Nashville competes with Chattanooga for business on the lines of the *Nashville, Chattanooga and St. Louis Railway* as far as Bridgeport, Ala., which is about 30 miles from Chattanooga and 121 miles from Nashville; on the line of the *Memphis and Charleston Railroad* as far as Scottsboro, Ala., which is 56 miles from Chattanooga and 125 miles from Nashville; on the line of the *Alabama Great Southern Railroad* as far as Rising Fawn, Ga., which is 26 miles from Chattanooga and 177 miles from Nashville; on the line of the *Western and Atlantic Railroad* at Ringgold, Ga., 23 miles from Chattanooga and 174 miles from Nashville; at Tunnel Hill, Ga., 31 miles from Chattanooga and 182 miles from Nashville; at Dalton, Ga., 38 miles from Chattanooga and 189 miles from Nashville; at Calhoun, Ga., 60 miles from Chattanooga and 211 miles from Nashville; at Cartersville, Ga., 90 miles from Chattanooga and 241 miles from Nashville; at Acworth, Ga., 100 miles from Chattanooga and 251 miles from Nashville; on the line of the *Southern Railway* at Cleveland, Tenn., 29 miles from Chattanooga and 189 miles from Nashville; at Athens, Tenn., 56 miles from Chattanooga and 207 miles from Nashville, and on the line of the *Cincinnati, New Orleans and Texas Pacific Railway*

(Cincinnati Southern) as far as Rathburn, Tenn., 22 miles from Chattanooga and 173 to Nashville.

(See testimony, in answer to interrogatory No. 4, of W. L. Magill, T. H. Payne, T. A. Snow, W. J. Dobbs, I. B. Merriam, and M. A. Timothy, Record, pp. 241, 243, 245, 247, 248, 251, 253).

It is thus seen that Nashville merchants compete with Chattanooga merchants for business at points immediately around Chattanooga in almost all directions, not only in territory between Chattanooga and Nashville, but also at points in Georgia and Alabama beyond Chattanooga from Nashville, and *in order to reach which goods from Nashville have to be hauled through Chattanooga;* and in this competition all these witnesses testify that Chattanooga merchants are placed at a disadvantage because of the lower rates to Nashville than to Chattanooga.

(See answers of above-named witnesses to interrogatory No. 5, Record, pp. 241, 243, 246, 248, 251, 254.)

T. H. Payne, a merchant of Chattanooga who has been engaged in the book, stationery, and wall-paper business at Chattanooga *for 31 years*, testifies as follows:

Question 6. "If, in answer to the preceding interrogatory, you say disadvantage exists and results from a discrimination in rates in favor of Nashville and against Chattanooga, give examples of this discrimination in rates in the sale of dry goods, groceries, hardware, and other commodities or classes of merchandise."

Answer. "In the stationery line—paper and envelopes to Nashville are 78 cents, to Chattanooga 98 cents, a difference of 20 cents per hundred pounds in the freight from New York. Nashville merchants can *sell* all the heavy and bulky goods, such as paper and envelopes, at the price Chattanooga merchants *pay*, and make a living profit. School slates in less than carload lots, freight to Nashville 42 cents, freight to Chattanooga 86 cents. At the average price of slates from one year to another, it costs about 40 cents on the dollar to lay them down in Chattanooga, while the same goods are hauled 151 miles farther and laid down in Nashville for about 20 cents on the dollar, making a difference of about 20 per cent in favor of Nashville, which prohibits the sale of these goods by Chattanooga merchants in territory reached by Nashville."

Question 7. "State how long discrimination in favor of Nashville and against Chattanooga has existed and what effect, if any, it has had upon the business prosperity of Chattanooga."

Answer. "It has existed for years, depressing business and retarding prosperity." (Record, 244.)

T. A. Snow, of the firm of T. A. Snow & Co., who have been dealers in stoves and house-furnishing goods at Chattanooga for *twenty-four years* testifies:

Question 7. "State how long this discrimination in favor of Nashville and against Chattanooga has existed, and what effect, if any, it has had upon the business and prosperity of Chattanooga."

Answer. "I think it has existed ever since I have been in business—that is, twenty-four years. We could never sell and make the same profits as the Nashville merchants. This discrimination has seriously affected the prosperity of Chattanooga." (Record, p. 246.)

W. J. Dobbs, who has been engaged in the wholesale grocery business in Chattanooga *for twenty-five years*, testifies:

Question 6. "If, in answer to the preceding interrogatory, you say disadvantage exists and results from a discrimination in rates in favor of Nashville and against Chattanooga, give examples of this discrimination in rates in the sale of dry goods, groceries, hardware, and other commodities or classes of merchandise."

Answer. "The rate of freight on canned goods, Baltimore to Chattanooga, is 45 cents in carload lots, and in less than carload lots 56 cents. From Baltimore to Nashville the rate is 33 cents in carload lots and 39 cents in less than carload lots, a difference of almost 40 per cent.

"On canned goods from New York to Chattanooga, carload lots, 48 cents; less than carload lots, 56 cents. From New York to Nashville, carload lots, 36 cents, and on less than carload lots 42 cents.

"On green coffee from Baltimore to Chattanooga our rate is 46 cents. Baltimore to Nashville the rate is 28 cents.

"On green coffee from New York to Chattanooga our rate is 49 cents; from New York to Nashville the rate is 31 cents.

"On keg soda from New York to Chattanooga our rate is 60 cents. From New York to Nashville the rate is only 36 cents. From New York to Louisville, Ky., the rate is only 12 cents. *We have been shipping in carload lots keg soda to Louisville and shipping via Nashville to Chattanooga at a cost of only 14½ cents. After paying the local rate from Louisville to Nashville and from Nashville to Chattanooga, we make a saving of over 15 cents.*

"On baking powder from New York to Chattanooga, on less than carload lots, 86 cents; in carload lots, 73 cents. From New York to Nashville, in less than carload lots, 60 cents, and on carload lots, 42 cents."

Question 7. "State how long discrimination in favor

of Nashville and against Chattanooga has existed, and what effect, if any, it has had upon the business and prosperity of Chattanooga."

Answer. "The freight discrimination in favor of Nashville has existed for years and years—ever since I have been in business (twenty-five years). It has prevented the Chattanooga jobbers from reaching out into the territory properly belonging to Chattanooga. The Chattanooga jobbers can only sell in the extreme part of their territory such goods as rates of freight do not enter into their consideration on account of their lightness, as extracts of bluing and other small items. Also goods sold on equality plan—that is, where the buyer is allowed the freight from the shipping point to his destination, or a delivering price named by the manufacturer, putting every jobber on an equal footing, regardless of his location."

Question 14. "What effect, if any, do relatively high rates to a locality, or rates which discriminate against a locality, have on its prosperity and progress?" * * *

Answer. "It has a tendency to break down commerce and prevents a merchant from increasing his force, decreases profits, and paralyzes business in general."

Question 26. "Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Answer. "* * * Such discrimination existing, it is utterly impossible for Chattanooga merchants to maintain their legitimate territory. It is absolutely wrong for Nashville to have such material advantage in competing with others in a common market. Chattanooga merchants are entitled to their natural advantages. It is very subduing to Chattanooga jobbers, when competing with Nashville merchants, to know that Nashville enjoys so much lower rates from all points, regardless of geographical location. There are

comparatively few goods shipped from the East to either Chattanooga or Nashville via Cincinnati. Nearly all shipments from the East to Nashville come through Chattanooga, as the distance from New York to Nashville via Chattanooga is 1,014 miles, and from New York to Nashville via Cincinnati is 1,053 miles.

"*The through rates from the East to Chattanooga in many instances are higher than the rate through from New York to Chattanooga via Nashville, paying local rates from Nashville to Chattanooga. In other words, sometimes goods are shipped in carload lots to Nashville and reshipped to Chattanooga, taking the local rate out of Nashville to Chattanooga, and a slight saving is made over the through rate from New York to Chattanooga.*" (Record, pp. 248, 249, 251.)

I. B. Merriam, who has been engaged in the wholesale grocery business in Chattanooga *for 18 years*, testifies:

Question 5. "State whether Chattanooga merchants, in competing with Nashville merchants, * * * are subjected to any disadvantage; and if so, state what this disadvantage results from."

Answer. "The Chattanooga merchants are at a disadvantage in competing with Nashville merchants, and this arises from the fact that the rates from the East on freight are so much lower to Nashville than to Chattanooga that it enables the merchants of Nashville to reship their goods and sell them at lower rates than is possible for Chattanooga merchants in the same territory."

Question 6. "If, in answer to the preceding interrogatory, you say this advantage exists and results from a discrimination in rates in favor of Nashville and against Chattanooga, give examples of this discrimination in rates in the sale of dry goods, groceries, hardware, and other commodities or classes of business."

Answer. "The rate from New York to Nashville on coffee is 31 cents, passing through Chattanooga, and from New York to Chattanooga 49 cents, *enabling Nashville to ship coffee from New York to Nashville and come back to Chattanooga on the same line for less than Chattanooga gets her rates from New York.*

"Canned goods from Baltimore to Nashville 35 cents per hundred pounds, and to Chattanooga 48 cents, giving them the same advantage as in coffee.

"This discrimination in favor of Nashville and against Chattanooga continues through all other lines shipped from the East." (Record, pp. 251, 252.)

In answer to the general interrogatory given above, No. 26, this witness (I. B. Merriam) testified:

Answer. "The rates of freight as given in my testimony from New York to Chattanooga and to Nashville give Nashville a chance to undersell Chattanooga at all competitive points and force Chattanooga out of the market at these points. As an illustration, *7 years ago Chattanooga had 7 wholesale grocery stores and she now has 4; she had 2 wholesale dry goods stores, she now has 1; she had 2 wholesale shoe stores; she now has 1. The volume of trade has increased in Nashville, but has not increased in Chattanooga.*" (Record, p. 253.)

Judge Severens, in commenting upon the excess of the Chattanooga rates over those to Nashville, says:

"The result is that the merchants of Chattanooga can ship their goods from the East through to Nashville on the Nashville rate and then ship them back to Chattanooga on local rates at less cost than the charges on an original shipment direct to Chattanooga. The natural result is that the merchants and tradesmen of Nashville can undersell the merchants and tradesmen of Chattanooga in much of the commercial sphere of the latter

place, for the Nashville people can ship directly to the points tributary to Chattanooga; and the evidence shows it is the practical result. *There is evidence also tending to show that the commercial business of Chattanooga has for years been stagnating. It may be and probably is true that this is in part due to other causes, but considering that no small part of the value of goods shipped over the long distance from the Eastern markets to Chattanooga is represented by the freight rates it has borne, it would be manifest without other evidence that the great disparity of rates above shown would go far to crush out the commercial life of a city so heavily burdened.*" (Record, p. 371.)

Discrimination is contrary to natural right and abhorrent to the law. The leading feature of the act to regulate commerce is the provision of a remedy for unjust discrimination, and *in particular for discrimination as between different localities.* In the language of the Supreme Court of the United States in Union Pacific Company *v.* Goodrich (149 U. S., 680), the law was designed to "*cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, and favored corporations.*"

If discriminations such as are shown by the undisputed evidence in this case, resulting in material damage and the grossest injustice to Chattanooga, do not fall within the evil intended to be remedied by the act to regulate commerce, then it will be difficult to conceive of a case of discrimination which would come within the purview of that act.

Discriminations which result in the very abuses which the act to regulate commerce was designed to remedy can not be justified under the act.

We have shown that the competition on transportation from the Eastern seaboard would, under normal conditions, be greater at Chattanooga than at Nashville, and, therefore, the Chattanooga rates should be at least as low as, if not absolutely lower than, the Nashville rates; but we contend that, even if the proof showed actual competition of greater force at Nashville than at Chattanooga, the discrimination practiced in this case is excessive, and that to allow competition to justify such discrimination will be to nullify the law itself.

Chapter XI.

SIXTH PROPOSITION.

THE ORDER OF THE COMMISSION, HOW IT MAY AND SHOULD BE ENFORCED.

IF ENFORCED BY REDUCING CHATTANOOGA RATES, WILL NOT RESULT IN LOSS OF REVENUE TO CARRIERS.

MAY BE ENFORCED BY ADVANCING NASHVILLE RATES WITHOUT DIVERTING TRAFFIC TO COMPETING LINES.

Our sixth proposition in answer to the plea of competition is—

That, inasmuch as the order of the Commission is simply that the carriers desist from charging higher rates to Chattanooga than to Nashville, it may be complied with, if the carriers so elect, by giving Chattanooga rates as high as those to Nashville, thus ignoring the natural advantage of the former in being the shorter distance point, and this will be a reasonable allowance for any possible dissimilarity of conditions resulting from the competition at Nashville shown in this case.

Such being the character of the order of the Commission, the carriers may bring themselves within its letter, if not within its spirit, by leaving the Chattanooga rates as high as the Nashville rates. The order does not require that the Chattanooga rates shall be as high as

the Nashville rates, and if the carriers pursue that course, it will be their voluntary act in the exercise of the discretion left them under the order.

Inasmuch as the factors of competition are greater at Chattanooga than at Nashville and under *normal* conditions the competition at Chattanooga would be greater than at Nashville, the rates to Chattanooga should be less than to Nashville. The Commission, however, has always pursued a conservative course, and in its orders has left the carriers a margin so as to avoid any possibility of injury to them. Conceding *arguendo* that there is a greater force of competition at Nashville than at Chattanooga, the option left the carriers under the order to leave the Chattanooga rates as high as the Nashville rates makes due allowance for any dissimilarity of conditions resulting therefrom.

It having been held by this court that the Commission has no power to prescribe rates (I. C. C. *v.* Railway Company, 167 U. S., 479), the Commission could not do *exact justice* by fixing the rates to be charged to Chattanooga and Nashville, respectively. Its order pursues the language of section 4 of the law, and affords relief both under that section and under section 3—section 4, prohibiting the greater charge for the shorter than the longer haul, being in the nature of a *specification* under the general provision of section 3, prohibiting undue preferences in rates as between different localities.

HOW THE ORDER MAY BE ENFORCED.

It is not for the court to determine how the carriers shall comply with the order of the Commission, but as counsel for the carriers has displayed great ingenuity in attempting to show that there is no practical mode of complying with the order without inflicting great and unreasonable loss upon the defendant carriers, it is a proper matter for consideration.

The order being simply that the Chattanooga rates shall not exceed the Nashville rates, the carriers are left the discretion to comply with it either by advancing the Nashville rates or reducing the Chattanooga rates, *or by both such advance and reduction in certain proportions.*

The latitude given the carriers in the order, instead of being appreciated as a favor, is complained of and made a ground of objection. If the Commission had in its order dictated *the mode* in which it should be obeyed, counsel for carriers would have denounced it as an inflexible cast-iron order, unauthorized by law.

FALSE ASSUMPTION THAT COMPLIANCE WITH ORDER WILL REQUIRE EITHER AN ADVANCE OF THE NASHVILLE RATES OR A REDUCTION OF THE CHATTANOOGA RATES TO THE FULL EXTENT OF THE DIFFERENCE BETWEEN THOSE RATES.

In taking the testimony before the court in behalf of the carriers, counsel assumed that the order of the Commission could only be obeyed by advancing the Nashville rates or reducing the Chattanooga rates to the *full extent of the difference* now existing between those rates. In answer to interrogatories *framed on this assumption*, his witnesses gave it as their opinion that *such* an advance of the Nashville rates over the defendants' lines would divert the traffic to other lines, and that such reduction in the rates to Chattanooga would result in an unreasonable loss of revenue to the carriers transporting the traffic to Chattanooga.

That this assumption is false is clear from the fact *that the rates to Chattanooga may be made not higher than those to Nashville by reducing the Chattanooga rates to the extent of one-fourth, one-third, one-half, two-thirds, or other proportion of the difference between the two sets of rates, and advancing the Nashville rates to the extent of three-fourths, two-thirds, one-half, one-third, or other proportion of that difference.*

If it be true, as testified by the witnesses for the carriers, that an advance of the rates to Nashville or a

reduction of the rates to Chattanooga to the *whole extent* of the difference between those rates would result disastrously to the carriers, it does not follow that such consequences would flow from an advance of the one and reduction of the other in certain proportions of the difference between them.

This proof, therefore, on the part of the carriers might be true, and still not afford them justification or excuse for noncompliance with the order of the Commission.

COMPLIANCE WITH THE ORDER BY A REDUCTION OF THE CHATTANOOGA RATES.

THE ORDER SHOULD BE COMPLIED WITH BY REDUCING THE CHATTANOOGA RATES.

It is shown in a subsequent chapter of this argument (Chapter XVII) that the rates from the Eastern seaboard to Chattanooga are excessive, not only relatively as compared with the Nashville rates, but absolutely. This being the case, the order should be complied with by a reduction of the Chattanooga rates. The Commission so recommends in its report and opinion. On this point the Commission says:

"It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville rate, and on that assumption the only practical relief is a reduction in rates to Chattanooga." (Record, p. 54.)

This reduction, as we have shown above, may be made in various proportions of the difference between the Chattanooga and Nashville rates, less than the total of that difference, and result in rates not higher to Chattanooga than to Nashville, provided it is accompanied by proportionate advances in the Nashville rates.

A REDUCTION IN THE CHATTANOOGA RATES IS OBJECTED TO ON THE GROUND MAINLY THAT IT WILL RESULT IN LOSS OF REVENUE TO THE ROADS.

(*a*) If the rates to Chattanooga are reduced to the full extent of the difference between those rates and the Nashville rates, witnesses for the roads testify there would be a loss of revenue, but the amount of the loss is not given. That loss can not be greater than the damage resulting to Chattanooga from the present adjustment of rates. Some idea of the extent of that damage may be had from the fact that, according to the undisputed testimony, Chattanooga's wholesale grocery stores have during the last seven years been reduced from 7 to 4 and her wholesale dry goods stores and shoe stores from 2 to 1.

It is a self-evident proposition that the law did not contemplate that a carrier, in protecting itself from loss, should inflict a serious and immeasurably larger loss upon a community—a portion of the public—located at one of its termini.

(*b*) NO LOSS OF REVENUE WILL RESULT. *The opinion of railroad witnesses that a reduction in the rates to Chattanooga would be attended by loss of revenue to the roads is based on the false assumption that there would be no increase in the tonnage of traffic to Chattanooga under such reduced rates.* The universally recognized facts that a reduction in rates to a locality, so as to put it in a position of relative equality with its competitors, advances the prosperity of such locality, increases its business, and hence enlarges the tonnage of traffic transported to it, is wholly ignored by witnesses for the roads.

Mr. Aldace F. Walker, who was then a member of the Interstate Commerce Commission, but who resigned that position to accept employment from the roads, and whose views, *since his resignation*, are of great weight with carriers, said in an opinion of the Commission prepared by him (3 I. C. C. R., pp. 48–9):

"They say that the railroads must live or there can be no commerce by rail, and they insist *that any reduction of rates means loss of revenue*, which is against the public interest and the carrier's right, unless the rate in question be unreasonable *per se; but it is not clear that the application of the general rule of the law*" (the long and short haul rule of sec. 4) "*means permanent loss of revenue. The stimulus given to business at intermediate points will increase traffic largely. That proposition has been so often practically demonstrated that no intelligent observer can reject it.*"

The decision of this court in Chicago *v.* Wellman (143 U. S., p. 343) is to the same effect. In that case this court says:

"May it not be possible—indeed, *does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings?*"

A reduction in the rates to Chattanooga so as to place that city on an equal footing with Nashville would so increase the tonnage of traffic to Chattanooga that the revenue of the carriers would be augmented rather than diminished. *The carriers are losing revenue because of their discriminations against Chattanooga.* Instead of transporting traffic for 7 or more wholesale grocery houses they are transporting for only 4, and instead of hauling traffic for 2 or more wholesale dry goods and shoe houses they are hauling for only 1.

Not only will there result a greater tonnage of traffic hauled to Chattanooga *from an increase in Chattanooga business*, but also from the *increased demand by consumers* resulting from the lower prices brought about by lower rates. To this effect is the following extract from the opinion of this court in the "Joint Traffic Association Case" (171 U. S., 505):

"The result of lower rates is generally a *greater demand* for the articles transported, and this greater demand can only be gratified by *a larger supply*, the furnishing of which increases commerce. * * * (171 U. S., p. 576.)

COMPLIANCE WITH THE ORDER BY AN ADVANCE OF THE NASHVILLE RATES.

The contention is that if the rates by the lines through Chattanooga to Nashville (the lines involved in this case) are advanced to the *full extent* of the difference between the Nashville and Chattanooga rates, the result will be that the line via Cincinnati will retain its present rates and thus secure all the traffic; that the Nashville, Chattanooga and St. Louis Railway would suffer injury in the loss of the traffic, and that Chattanooga would get no relief.

In coming to this conclusion counsel ignores the significant fact that on the route from the eastern seaboard via Cincinnati to Nashville the portion of the through rate for the haul from Cincinnati to Nashville *is the rate of the Louisville and Nashville Railroad and made by that company alone*, and the further facts stated in the following extract from the opinion of the circuit court of appeals in this case:

> The Louisville and Nashville Railroad Company, "through its ownership of a majority of the stock of the Nashville, Chattanooga and St. Louis Railway Company, which operates a road from Nashville through Chattanooga to Atlanta, its joint operation of the railroad of the Georgia Central Railroad and Banking Company from Atlanta to Savannah in connection with the Ocean Steamship Company, of which the Georgia Central Company owns all the stock, *is very largely interested in traffic from the eastern seaboard to Chattanooga and through Chattanooga to Nashville.*"
> (Record, p. 414; stipulation, record, pp. 258, 259.)

The Louisville and Nashville Railroad Company is thus seen to be interested, not only as the owner of a majority of the capital stock of the Nashville, Chattanooga and St. Louis Railway, which extends from Nashville to Chattanooga and leases the line of the Western and Atlantic road from Chattanooga to Atlanta, but is also interested in the entire through line from Nashville *via Chattanooga* and Atlanta to Savannah and thence by ocean to the eastern seaboard.

Is it to be believed that, in the event the rates of the Nashville, Chattanooga and St. Louis Railway are advanced, the Louisville and Nashville road would refuse to protect by an advance of its own rates its financial interest in the former road and in the entire line from Nashville *through Chattanooga* to the eastern seaboard?

We have heretofore shown in Chapter IV that, *as held by the circuit court of appeals*, the proportion of the through rate from the eastern seaboard charged by the Louisville and Nashville Railroad for the haul from Cincinnati to Nashville may be advanced so as to make the Nashville rates as high as the Chattanooga rates without diverting the traffic to the river line from Cincinnati or Paducah or Evansville to Nashville.

After stating that practically all the local traffic from Cincinnati to Nashville (as well as the through traffic from the eastern seaboard) went by the rail line of the Louisville and Nashville road, notwithstanding the

river rates were only about one-half of the rail rates, the circuit court of appeals says:

"The local railway rates to Nashville from Ohio River points" (Cincinnati, Louisville, and Evansville) "are about 50 per cent higher than the through rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga the Louisville and Nashville Company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum, it is clear that any increase on through rates, under which they would still be less than local rates, can not affect river competition at all. In other words, the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elected to bring about the equality enjoined in the order by increasing the Nashville rate to the Chattanooga rate."

(Record, bot. p. 411.)

The Louisville and Nashville Railroad was not originally made a party defendant to this proceeding, but so great was its interest in the matter in controversy that it voluntarily appeared and filed an answer, in which it takes pains to set forth its interest in the line which we have mentioned above, from Nashville via Chattanooga, Atlanta, and Savannah to the eastern seaboard, and it was subsequently made a party defendant by formal order of the Commission.

(See Record, pp. 87, 104.)

If the Louisville and Nashville Railroad, notwithstanding its interest in the line from Nashville *through*

Chattanooga to the eastern seaboard, should refuse to advance its rates on an advance of the rates by that line, then it will be open to the charge of contumacy; in other words, to the charge of being actuated by a purpose to render nugatory the order of the Commission and the decree of the courts.

Counsel for the carriers strenuously contends that while the proportion of the through rate from the eastern seaboard via Cincinnati charged by the Louisville and Nashville Railroad for the haul from Cincinnati to Nashville pays something in excess of the cost of transportation, *it does not yield full and adequate remuneration.* If this be so, and if it be true, as held by the circuit court of appeals in the above extract from its opinion, that an increase of its rates would not divert traffic to the river line, then it would seem *the Louisville and Nashville road would be glad of an opportunity to make its rates adequately remunerative.*

Conceding that the line involved in this case *via Chattanooga* to Nashville may comply with the order by advancing the Nashville rates, and that the Louisville and Nashville road may not correspondingly advance its rates from Cincinnati to Nashville, is this a valid ground for holding the order of the Commission to be unlawful and for refusing to decree its enforcement? The presumption is that the line through Chattanooga will pursue the natural and proper course by reducing the Chattanooga rates.

CHAPTER XII.

THE ORDER OF THE COMMISSION CONTINUED.

OBJECTION TO ADVANCE OF NASHVILLE RATES ON THE GROUND THAT NASHVILLE MUST BE PROTECTED IN HER COMPETITION WITH CINCINNATI, LOUISVILLE, AND EVANSVILLE.

OBJECTION TO ADVANCE OF NASHVILLE RATES ON THE GROUND THAT "THE LOUISVILLE AND NASHVILLE RAILROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE."

But it is said by counsel in his briefs, "THE LOUISVILLE AND NASHVILLE RAILROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE," and that it is necessary to give Nashville rates not higher than the present rates to "*enable Nashville to compete with Cincinnati, Louisville, and Evansville in the territory between Nashville and the Mississippi River.*"

Here also is the fact that the rates from Cincinnati, Louisville, and Evansville to Nashville and from Nashville to those cities are the rates of the Louisville and Nashville Railroad and are made by that road alone.

The "*maintenance of the commercial importance of Nashville*" being so "*vital*" to the Louisville and Nashville Railroad, it could, if an advance in rates from the East to Nashville become necessary, easily readjust its rates from Nashville to Cincinnati, Louisville, and Evansville so as to protect Nashville in its competition with those cities.

The truth is, the Louisville and Nashville Railroad and the Nashville, Chattanooga and St. Louis Railway are practically *one system*. The rates over the latter from Chattanooga to Nashville, as well as those over the former from Cincinnati to Nashville, are made by the former. *When you strike the one you strike the other.* If the Louisville and Nashville Railroad, in the language of counsel for the roads, is "*vitally interested in maintaining the commercial importance of Nashville,*" *it is equally a "vital" matter to the Nashville, Chattanooga and St. Louis Railway, dominated, as it is, by the former.*

A flood of light is thrown upon the "true inwardness" of the "startling" discriminations against Chattanooga in favor of Nashville by the declaration of counsel for the carriers, that "the Louisville and Nashville Railroad is VITALLY interested in maintaining the commercial importance of Nashville."

If the Louisville and Nashville Railroad is "vitally interested in maintaining the commercial importance of Nashville," *the administration of justice is vitally inter-*

ested in seeing that the commercial importance of Nashville is not maintained at the expense of Chattanooga and by means of the grossest discriminations against that city.

The circuit court, in commenting upon the above statement of counsel for the carriers as a ground for giving Nashville low rates, that "THE LOUISVILLE AND NASHVILLE RAILROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE," says:

"In the full and elaborate brief of counsel for the railways several reasons are advanced why it would be difficult to so readjust the rates as not to discriminate against Chattanooga. Attention has been given to all of them; but none of them, in my opinion, rests on any sufficient ground or constitutes any valid justification. *One of these reasons is so striking and significant that it deserves special consideration. It is urged that the Louisville and Nashville Railroad Company is vitally interested in maintaining the commercial importance of Nashville, and can not, with due regard to that purpose, so adjust the rates at that place as to enable the respondents to do otherwise than discriminate against Chattanooga;* but it appears that that company owns and controls a majority of the stock of the Nashville, Chattanooga and St. Louis Railway Company, the respondent carrier which constitutes that part of the through lines which extends from Chattanooga to Nashville, and fixes the rates for that road. It is therefore in a position to insure to Nashville such concessions as to advance its favoring purpose with reference to that city. It really has no competition there unless it be from the navigation of the Cumberland River.

* * * * *

"Now, the purpose to increase the commercial prosperity of Nashville is in itself a laudable one, and the

court would be far from having any inclination to obstruct it when it is pursued in a lawful way. *It is to be hoped and believed, however, that the carriers will be able to find a way to remedy the injustice of the present situation without prejudice to any beneficent purpose toward Nashville. But it is a hard measure of justice to Chattanooga if the upbuilding of the one city is to be done at the charge of the other, by selecting the latter as one to bear the oppressive rates which shall go to make up for the moderate rates charged at the former.*" (Record, pp. 376, 377.)

The circuit court of appeals in its opinion in this case, in commenting upon this "vital interest of the Louisville and Nashville Railroad in the commercial importance of Nashville," says:

"Nor can it be said that the Louisville and Nashville Company, *whose fostering care of Nashville is insisted upon in the evidence and briefs for defendants*, and is offered as a motive for its low rates to Nashville, is not a party to the *plan by which Chattanooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her.*" (Record, mid. p. 414.)

CHAPTER XIII.

THE ORDER OF THE COMMISSION CONTINUED.

OBJECTION TO COMPLIANCE WITH ORDER BY REDUCTION OF CHATTANOOGA RATES ON THE GROUND THAT IT WILL NECESSITATE A READJUSTMENT OF RATES TO ROME, DALTON, FLORENCE, AND OTHER LOCALITIES GROUPED WITH CHATTANOOGA.

(*a*) The above objection to a reduction in the Chattanooga rates—that it will necessitate a readjustment of rates to Dalton, Rome, Florence, Decatur, Meridian, Enterprise, and other points having the same rates as Chattanooga—is without force.

If that be recognized as ground for overruling the order of the Commission, then no order correcting unlawful rates to a locality which competes with other localities can be enforced, and the law will be a nullity. All points of any importance compete with others.

If the rates to Chattanooga are unlawful, then rates to other localities, based on or adjusted with reference to those unlawful rates, are themselves unlawful or on a false basis, and call for correction or readjustment. It can not be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction to other localities.

On this point the circuit court says:

"It is urged that the enforcement of this order will disturb the whole scheme of freight rates in a wide section. I am fully conscious of the responsibility I must assume in giving effect to the order, though my expectation is that the companies will find less difficulty in conforming to the order than their counsel seems to fear. *But however that may be, the duty of the court to right the injustice encountered is plain. Surely it can not be contended that the rights of one community can be so entangled by a system of rates affecting many others also that justice can not be done when those rights are denied or withheld.*" (Record, bottom p. 380, top p. 381.)

In commenting upon this matter the circuit court of appeals uses the following language:

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, * * * and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the interstate-commerce act was passed. The group in which Chattanooga is placed, * * * *puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much further moved from the region of trunk line rates and with much fewer natural competitive advantages.* If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the South, *this is no ground for refusing to do justice to Chattanooga.*"
(Record, p. 415).

The evidence for the roads before the court shows that the rates to Chattanooga, Dalton, Rome, etc., and

all competitive points in Southern territory (territory east of the Mississippi and south of the Ohio and Potomac rivers) were established and are maintained by *agreement* between the carriers interested therein. (Answers of Van Den Burg to cross-questions 82–6, Record, 140.) They can be readjusted to Chattanooga, Rome, Dalton, etc., *by agreement*, so as to be brought into conformity with the law without injustice to any locality or interest.

"*Where there is a will there is a way.*" The carriers are constantly solving with ease rate problems much more difficult than that involved in any readjustment of rates to other points which may be rendered necessary by bringing Chattanooga rates in line with the rule of the law. The "way" is not wanting, but the "will." *To plead inability is to confess incompetence.*

THE TWIN SCARECROWS.

The twin scarecrows, bankruptcy of carriers and readjustment of rates to localities competing with the locality making complaint, are paraded by counsel for carriers in all these cases. *They were paraded before the courts in the Social Circle case. The courts were told that making the rates to Social Circle not higher than to Augusta would necessitate a like change in rates to all stations around Social Circle and between Social Circle and Augusta, and that this would bring bankruptcy to the carriers. The order of the commission was sustained, and, so far as we have*

heard, none of the dire consequences predicted have resulted from its enforcement.

(*b*) THE RATES TO CHATTANOOGA AND LOCALITIES GROUPED WITH CHATTANOOGA SHOULD BE READJUSTED.

THIS READJUSTMENT SHOULD BE BY REDUCING CHATTANOOGA RATES, CHATTANOOGA BEING THE SHORTER DISTANCE POINT, WITH GREATER COMPETITIVE AND NATURAL ADVANTAGES.

The statement by the circuit court of appeals in the above extract from its opinion, that "*the group in which Chattanooga is placed puts her on an equality in respect to eastern rates with towns and cities of much less size and business and much farther removed from the region of trunk-line rates and with much fewer natural competitive advantages,*" *shows that a readjustment of rates is necessary in order to do justice to Chattanooga.*

The localities with which Chattanooga is grouped are twenty-four in number and all of these localities are longer distance points from the eastern seaboard than Chattanooga, and, as stated by the circuit court of appeals, "of much less size and business and much further removed from the region of trunk-line rates and with much fewer natural competitive advantages."

Among the most important of these localities grouped with Chattanooga are Decatur, Florence, Tuscumbia,

Sheffield, Ala., and Meridian and Enterprise, Miss. The haul from the eastern seaboard to Decatur is 122 miles longer than to Chattanooga; to Tuscumbia and Sheffield, 165 miles longer; to Florence, 171 miles longer, *and to Meridian, 296 miles and to Enterprise 311 miles longer than to Chattanooga.* All these points, however, have rates from the eastern seaboard as low as the Chattanooga rates.

This demonstrates that a readjustment of rates in this group is called for, *and that such readjustment should be brought about by a reduction in the Chattanooga rates.* It further shows that such reduction in the Chattanooga rates will not necessitate a reduction in the rates to the other more distant, less important localities, possessing "much fewer natural competitive advantages" than Chattanooga. By such reduction of the Chattanooga rates, the relation between the Chattanooga rates and the rates to such other localities will be made to more closely *approximate justice.*

One of the counsel for the carriers, while making the concluding argument for the carriers in the circuit court of appeals, was asked by a member of the court how this so-called system of rate making which prevailed in this territory in which Chattanooga and Nashville are located came into existence. He could give no satisfactory answer to the question and finally stated that it was "haphazard."

The gross discrimination under this so-called system is sufficient in itself, without this admission of counsel for carriers, to show *that the present adjustment of rates in this territory is not the result of methodical or intelligent arrangement.*

It is certainly high time that this "*haphazard*" condition of things was done away with, and the statement of counsel for the carriers in reply to the question of the court is a strong argument in favor of a readjustment of rates in this section of the country, and shows the necessity for such remedial legislation as that embodied in the act to regulate commerce.

Chapter XIV.

THE ORDER CONTINUED.

OBJECTION TO COMPLIANCE WITH ORDER BY REDUCTION OF CHATTANOOGA RATES ON THE GROUND THAT IT WILL GIVE CHATTANOOGA THE ADVANTAGE OF ROME, DALTON, FLORENCE, AND OTHER TOWNS IN THE SAME GROUP.

NASHVILLE, UNDER EXISTING RATES, HAS A GREATER ADVANTAGE OVER THESE LOCALITIES THAN CHATTANOOGA WOULD HAVE ON A REDUCTION OF HER RATES TO THE LEVEL OF THE NASHVILLE RATES.

TENDER REGARD FOR NASHVILLE AND FOR ROME, DALTON, FLORENCE, ETC.; NONE FOR CHATTANOOGA.

We have shown in the preceding chapter that, as held by the circuit court of appeals, Chattanooga is entitled, by reason of her natural advantages, to lower rates than the other localities with which she is grouped.

It is strenuously urged, however, that a reduction of the Chattanooga rates will give Chattanooga an unjust advantage over Rome, Dalton, Florence, Decatur, Meridian, Enterprise, and eighteen other points having the same rates as Chattanooga unless the rates to those points are also correspondingly reduced.

The fact is ignored that under the existing lower rates to Nashville than to Chattanooga and all these twenty-four points having the same rates as Chattanooga, *Nashville has an unjust advantage not only over Chattanooga, but also over those other points.*

Among the most important of those other points are Florence, Tuscumbia, Sheffield, and Decatur, Ala. Nashville is the same distance by rail from Decatur as Chattanooga—122 miles—and is nearer to Florence, Tuscumbia, and Sheffield than is Chattanooga. The distances to those four points from Nashville and Chattanooga, respectively, are as follows:

From—	To—			
	Florence.	Decatur.	Tuscumbia	Sheffield.
Nashville	127 miles via L. & N.	122 miles via L. & N.	135 miles via L. & N.	132 miles via L. & N.
Chattanooga	171 miles via Sou. Ry.	122 miles via Sou. Ry.	165 miles via Sou. Ry.	168 miles via Sou. Ry.

Nashville, being a shorter distance from Florence, Tuscumbia, and Sheffield than Chattanooga, under existing lower rates to Nashville than to those three points, has a greater advantage over them than would Chattanooga under the same rates.

To a large number of the remaining twenty points of the twenty-four to which the rates are the same as to

Chattanooga, the distances from Nashville are not materially greater than from Chattanooga.

SOLICITUDE FOR NASHVILLE; NONE FOR CHATTANOOGA.

NASHVILLE INTERESTS PROTECTED IN ALL DIRECTIONS; CHATTANOOGA INTERESTS SACRIFICED IN ALL DIRECTIONS.

It is insisted that the rates to Nashville must not be advanced, because such advance would cripple Nashville in her competition with Louisville, Evansville, etc., and that the rates to Chattanooga must not be reduced, because such reduction would give Chattanooga an advantage over Rome, Dalton, etc.

Why are Rome, Dalton, etc., to be protected in their competition with Chattanooga, and Nashville in her competition with Louisville, Evansville, etc., and Chattanooga not to be protected in her competition with Nashville?

In the opinion of counsel for the carriers, it would seem that discrimination against Chattanooga, no matter how "startling," is a matter of no consequence, but that discrimination against Dalton, Rome, etc., or against Nashville, is too horrible to be contemplated with equanimity.

While Nashville is allowed to compete on equal terms in territory north of her, and is given the advantage over Chattanooga and the twenty-four points having

the same rates as Chattanooga south of Nashville and southwest of Chattanooga, Chattanooga, in fact, has no territory whatever in which she is not at a disadvantage, either in respect to Nashville or the twenty-four points having the same rates. It is manifest that Chattanooga, having as high rates as the *longer distance smaller points*—Rome, Dalton, Sheffield, Tuscumbia, Decatur, etc.—can not compete with those points in their territory, as Chattanooga would have to pay the same rates that those points pay for delivery of goods at Chattanooga, and then the additional transportation charges necessary to carry the goods from Chattanooga on.

Why is such tender solicitude manifested for Nashville in her competition with Louisville and Evansville, and for Rome, Dalton, etc., in their competition with Chattanooga, and none whatever manifested for Chattanooga in her competition with Nashville or with Rome, Dalton, etc.? *Why, also, is no solicitude manifested for Rome, Dalton, etc., in their competition with Nashville? If it be an outrage for Chattanooga to have an advantage over Rome, Dalton, etc., why is not this the case also as to Nashville?*

It is creditable to the carriers that this gross injustice done Chattanooga, and Rome, Dalton, etc., is, as their counsel stated, not the result of design, but merely of accident.

Chapter XV.

THE ORDER OF THE COMMISSION CONTINUED.

THE ORDER OF THE COMMISSION IS ADAPTED TO ENFORCE SECTION 3 AS WELL AS SECTION 4—IF SECTION 4 DOES NOT APPLY, SECTION 3 DOES.

The order of the Commission, it will be seen, is equally as well adapted to the enforcement of section 3 as to the enforcement of section 4.

It will not only do away with the higher rates for the shorter haul to Chattanooga than to Nashville, *forbidden by section 4*, but also remedy—in a measure, at least—the unjust prejudice or disadvantage to Chattanooga resulting from those higher rates to Chattanooga, *forbidden by section 3*.

Because of the higher rates to Chattanooga than to Nashville, Chattanooga is unduly prejudiced and placed at an unjust disadvantage in that, as shown by the testimony in this case (see original printed argument for appellee, pp. 70–78), Chattanooga merchants are unable to compete on equal terms with Nashville merchants, not only in territory immediately around Chattanooga, which is naturally tributary to Chattanooga, but also in territory equidistant from the two cities.

By removing the cause, namely, the higher rates to Chattanooga than to Nashville, the order of the Commission will enable Chattanooga merchants to compete on equal terms with Nashville merchants and do away with this undue prejudice or disadvantage to Chattanooga, thus giving the proper relief under section 3.

We contend that the dissimilarity of conditions, so far as competition or the elements of competition are concerned, are decidedly in favor of Chattanooga.

The charging of a higher rate to Chattanooga than to Nashville, when the dissimilarity of conditions, so far as competition or its elements are concerned, is in favor of Chattanooga, is certainly an undue preference under section 3 against Chattanooga and in favor of Nashville.

Counsel for the carriers admits in his briefs filed in the lower courts that although the Commission "may have erred in basing the order made by it in this case on the fourth section, yet if said order is lawful under the third section it will be the duty of the court to enforce it." He then says:

"Though the circumstances and conditions at the longer distance point may be substantially dissimilar from those at the shorter distance point, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown by the appellee that the disparity in rates constitutes an undue preference of the longer distance point, the rates may be declared to be unlawful."

CHAPTER XVI.

THE ORDER OF THE COMMISSION CONTINUED.

THE ORDER IS PRIMA FACIE LAWFUL; BURDEN UPON THE CARRIERS TO SHOW CLEARLY THAT IT IS UNLAWFUL.

THE ORDER NOW HAS THE SANCTION OF THE COMMISSION AND TWO COURTS.

The maxim or rule that all things are to be presumed "to be rightly done until the contrary is made to appear," which is invoked in aid of acts of public officers, tribunals, and administrative boards, performed in the discharge of their duties, applies with equal force to an order of the Interstate Commerce Commission, which is a bureau, tribunal, or administrative board of the Government established by the law of the land, and *whose orders are not ex parte, but the result of judicial investigation.*

THE ORDER OF THE COMMISSION NOW HAS THE SANCTION OF THREE TRIBUNALS.

As stated at the outset of this argument, the order of the Commission now has the sanction of three tribunals:

1. That of the Interstate Commerce Commission, a tribunal or administrative board created solely for the

investigation of questions of this character, having large experience in such investigations, and being given by the law special facilities for securing full and accurate information in reference thereto.

2. That of the United States circuit court for the eastern district of Tennessee, Judge Severens rendering the decision.

3. That of the United States circuit court of appeals for the sixth circuit, composed of Mr. Justice Harlan and Circuit Judges Taft and Lurton, *whose decision was unanimous.*

It will be "passing strange" if all these gifted and trained intellects, viewing the matter from a strictly impartial and judicial standpoint, should be so radically wrong in their conclusions, as the argument of counsel for the carriers necessarily implies.

In discussing this order, the circuit court (Judge Severens) says:

"This order is a just and reasonable one, and as near to the court's sense of the justice of the case as any the court could devise."

TO RAISE A MERE DOUBT OF THE LEGALITY OF THE ORDER NOT SUFFICIENT.

The Commission has made out a *prima facie* case by showing the issuance of its order and its violation, and the burden is thereby shifted to the defendants to show

clearly to the satisfaction of the court that the order is unlawful and should not be enforced. *To raise a mere doubt will not be sufficient.* In the case of Missouri Pacific Railway Comyany *v.* Texas and Pacific Railway Company (31 Fed. Rep., 862), Judge Pardee says:

"*Where the matter is not clear*" (that is, where it is not clear that the carrier is justified in a departure from the rule of the fourth section of the law) "*the object and policy of the law should prevail.*"

In *Interstate Commerce Commission* v. *The Louisville & Nashville R. R. Co. et al.*, in which rates from New Orleans to La Grange, the shorter distance point, and to Atlanta, the longer distance point, were involved, the United States circuit court for the southern district of Alabama (Judge Toulmin) says:

"The court is not so clear as to the proposition that the rates from New Orleans to La Grange are unreasonable and unjust in themselves and relatively so as compared with the rates to Atlanta * * * . But the findings of fact in the report of the Commission are made by law *prima facie* evidence of the matters therein stated, and the conclusions of the Commission based upon such findings are presumed to be well founded and correct, *and they will not be set aside unless error clearly appears.* The record does not clearly show that the Commission's findings and conclusions on this branch of the case are erroneous—are not in accordance with the law and the evidence—and the court should not overrule or in any other manner interfere with them."

(Fed. Rep.)

Chapter XVII.

THE CHARGE THAT THE RATES TO CHATTANOOGA ARE EXCESSIVE IN VIOLATION OF SECTION 1.

COMPETITION CAN NOT JUSTIFY EXCESSIVE RATES.

EXCESSIVENESS OF CHATTANOOGA RATES INFERRED FROM REASONABLENESS OF THE LOWER RATES FOR FOR THE LONGER HAUL TO NASHVILLE AND SHOWN IN MANY OTHER WAYS.

As we have stated at the outset, it is not only charged that the rates of the defendants to Chattanooga and Nashville are in violation of sections 3 and 4 of the law, but also that the rates to Chattanooga are excessive and therefore in violation of section 1.

The defendants traverse the charge that their rates to Chattanooga are excessive. They do not plead competition in answer to that charge. It is conceded by counsel for carriers that competition can not justify rates which violate the provision of section 1 of the law, requiring all rate charges to be just and reasonable in themselves.

In the "Alabama Midland Case" (168 U.S., 144), this court holds that competition may be set up as a defense

under sections 3 and 4 of the law, but neither this court, nor any other court, has held that competition may, while justifying discriminations under sections 3 and 4, indirectly set aside the fundamental provision of section 1, that all rate charges shall be just and reasonable.

In the "Behlmer case," decided at the present term, this court holds:

"That whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: *First. The absolute command of the statute that all rates shall be just and reasonable.*" * * *

EXCESSIVENESS OF CHATTANOOGA RATES INFERRED FROM REASONABLENESS OF LOWER RATES FOR LONGER HAULS THROUGH CHATTANOOGA TO NASHVILLE.

In the first place, it would appear, presumptively at least, that the rates from eastern seaboard cities to Chattanooga are unreasonably high in themselves, or excessive, *because traffic is, and for a long series of years has been, carried through Chattanooga and 151 miles farther on to Nashville and 310 miles farther on to Memphis at materially lower rates.*

NASHVILLE RATES PRESUMED TO BE REASONABLE.

The *prima facie* presumption is that these materially lower rates for the materially longer haul to

Nashville yield the carrier a reasonable remuneration over and above the expense of carriage.

This presumption belongs to the same class of presumptions as the presumption of *sanity*. An individual who would render services for a sum not reasonably remunerative—and that, too, not "incidentally, but for a long series of years"—would be held to be an incompetent business man, if not *non compos mentis*. There is no reason why the same rule should not be applied to carriers.

On this point Judge Severens says in his opinion in this case:

"*The charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul. Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumpiton would always be that the compensation charged for the services or thing is sufficient to be reasonable.*" (Record, p. 375.)

In this connection I quote as part of my argument the following extract from the opinion of the Commission:

"A strong presumption of its unreasonableness" (that is, unreasonableness of the Chattanooga rate) "is created by the voluntary action of the defendants themselves in seeking business at decidedly lower rates to points much more remote. When these carriers, for instance, charge 73 cents per hundred pounds on fourth-class freight

from New York to Chattanooga, and at the same time carry alike shipments 150 miles farther to Nashville for 42 cents a hundred, and *do this not incidentally but for a series of years, the belief that the higher rate is excessive becomes a positive conviction.* We are familiar with the argument by which the policy of lower rates to competitive points is defended, and concede its conclusiveness in certain cases and within certain limits; but *when the disparity between long and short distance charges reaches the proportions here exhibited* the inference is irresistible that the lesser rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the services rendered. As the Commission has said in another case, where a similar question was considered: 'The difference between the figures is too great to permit the lower charge to be justified by the rule of expediency without condemning the higher charge by the rule of reasonable compensation.'" (Record, p. 54.)

If, as we are bound to presume, the materially lower rates for a longer haul by 151 miles to Nashville yield the carriers a reasonable remuneration in excess of the cost of service, then the *same* rates to Chattanooga would yield a remuneration in excess of such reasonable remuneration, and rates to Chattanooga which are *materially higher* than rates to Nashville would yield a still greater remuneration in excess of such reasonable remuneration, and are presumptively excessive.

If, on the other hand, as all the witnesses for the carriers testify, the rates to Chattanooga yield only a reasonable compensation in excess of the cost of the service of transportation to that point, and are not excessive,

then the lower rates to Nashville yield not only nothing for the additional haul of 151 miles to Nashville, but less than nothing.

NOT LEFT TO PRESUMPTION.

But we are not left to presumption as to the reasonableness in themselves of the Nashville rates. On cross-examination a number of eminent railroad officials, namely, Y. Vandenberg, traffic manager of the Louisville and Nashville Railroad Company; Joseph M. Brown, traffic manager of the Western and Atlantic Railroad; R. E. Lutz, freight traffic manager of the Atlanta and West Point Railroad and of the Western Railway of Alabama, testified that the Nashville rates were reasonable in and of themselves, and that a rate was not reasonable in and of itself unless it yielded, *not some*, but a reasonable or proper remuneration in excess of the cost of the service of transportation.

The following is an extract from the testimony of Y. Vandenberg (*Record, pp. 138, 139*):

Cross-question 62. "The haul from New York to Nashville is 151 miles longer than the haul to Chattanooga, is it not?"

Answer. "Yes, sir."

Cross-question 63. "Is the 91-cent rate to Nashville reasonable in and of itself?"

Answer. "I think so."

Cross-question 67. "Is a rate reasonable which does not yield the carrier a *proper remuneration over and above the cost of service?*"

Answer. "I do not believe carriers make rates below the cost of transportation. I would consider such a rate as unreasonably low."

Cross-question 68. "It would not then be a reasonable rate unless it yielded a *proper remuneration* over and above the cost of service?"

Answer. "It would be an unreasonably low rate."

(Record, pp. 138, 139.)

Joseph M. Brown, traffic manager of the Western and Atlantic Railroad, who has been connected with the railroad freight transportation business in the United States since 1877, testified that the rates to Nashville were reasonable "*in and of themselves*," and also that a rate is not reasonable in and of itself which does not yield the carrier a *proper* (*not some*) *remuneration* over and above the cost of service of carriage. The following is an extract from his testimony on cross-examination:

Cross-question 6. This question, after reciting the rates to Chattanooga and Nashville, respectively, concludes thus:

"Are those rates to Nashville reasonable in and of themselves, in your opinion?"

Answer. "Yes, sir."

Cross-question 9. "Is a rate reasonable in and of itself which does not yield the carrier a *proper remuneration* over and above the cost of service of carriage?"

Answer. "I should say not. If carried for less than cost, it would be unreasonably low."

(Record, p. 186.)

R. E. Lutz, freight traffic manager of the Atlanta and West Point Railroad and of the Western Railway of Alabama, who had been in the transportation business about 28 years, testified that the rates to Nashville were reasonable "*in and of themselves*," and that a rate is not reasonable in and of itself which does not yield the carrier a proper remuneration over and above the cost of service of the carriage. (Record, pp. 189, 190.)

One of the witnesses for the roads, T. S. Davant, general freight agent of the Norfolk and Western Railway Company, having testified on cross-examination that the rates to Nashville from eastern seaboard cities were, in his opinion, "unreasonably low," counsel for the carriers on redirect examination attempted to show this witness that he was mistaken, and succeeded in proving by him that the rates to Nashville were reasonably high and not unreasonably low. This appears from the following extracts from the testimony of this witness:

> Cross-question 4. "You state that the rates to Chattanooga are just and reasonable in themselves. Are the rates to Nashville also just and reasonable in themselves?"
>
> Answer. "In my opinion the rates from New York and Boston to Nashville are *unreasonably low*."
>
> (Record, pp. 153, 154).

On redirect examination counsel for the roads, with a view, as above stated, of showing this witness that he was mistaken in testifying that the rates to Nash-

ville were "unreasonably low," examined him as follows on this point:

Q. 1. "Are not the rates from New York to Nashville made by the trunk lines to Cincinnati and thence by the Louisville and Nashville Railroad to Nashville?"
A. "Yes, sir."
Q. 2. "Do you regard the trunk-line rates from New York to Cincinnati as unreasonably low?"
A. "No, sir."
Q. 3. "Are not the proportions which the Louisville and Nashville road received from Cincinnati to Nashville on freight from New York the same per ton per mile as the trunk-line rates from New York and Cincinnati?"
A. "I can not answer that question definitely, but it is my opinion that they are about on that basis."
Q. 4. "Then, if the trunk-line rates per ton per mile from New York to Cincinnati are not unreasonable, do you think that the Louisville and Nashville proportions from Cincinnati to Nashville are unreasonably low?"
A. "No, sir."
(Record, p. 155.)

Here is conclusive proof of the most convincing character, made by counsel for the roads, that the rates to Nashville are not "unreasonably low." A total rate made up of two rates, each of which is not unreasonably low, can not itself be unreasonably low.

The distance, moreover, by the shortest rail line via Cincinnati to Nashville is greater than via Chattanooga, the distance by the shortest line from New York via Cincinnati being 1,053 miles, and the distance by the shortest line via Chattanooga from New York being 999 miles.

(See testimony of J. M. Smith in answer to interrogatory 17, Record, pp. 234, 235.)

Counsel for carriers concedes, then, that the Nashville rates (even by the long line *via* Cincinnati) are not "unreasonably low," and his witnesses testify to the proposition, which is *self-evident* and needs no proof, that a rate is "unreasonably low" which does not yield the carrier a "*proper*" (not some) "remuneration in excess of the cost of service of carriage."

Counsel for carriers correctly deemed it necessary to prove that the Nashville rates are not "unreasonably low," because if they are THAT ALONE CONSTITUTES AN UNDUE PREFERENCE IN FAVOR OF NASHVILLE.

THE RATES COMPLAINED OF.

Below are given the rates to Chattanooga, Nashville, and Memphis *complained of before the Commission.* Those rates are the same now as in 1892, when the order of the Commission was made.

To—	First class.	Second class.	Third class.	Fourth class.	Fifth class.	Sixth class.
Chattanooga	$1.14	$0.98	$0.86	$0.73	$0.60	$0.49
Nashville (151 miles farther on)	.91	.78	.60	.42	.36	.31
Memphis (310 miles beyond Chattanooga)	1.00	.85	.65	.45	.38	.35

Excess of rates per 100 pounds to Chattanooga over Nashville rates:

Classes:	1	2	3	4	5	6
	23 cts.	20 cts.	26 cts.	31 cts.	24 cts.	18 cts.

Excess of rates per minimum carload of 24,000 pounds to Chattanooga.

The Southern Freight Classification, under which these rates are established, provides for a minimum carload weight of 24,000 pounds. On this minimum carload weight of 24,000 pounds the rates to Nashville and Chattanooga, and the excess of the Chattanooga rates over the Nashville rates, are as follows:

Classes.	To Nashville.	To Chattanooga.	Excess of Chattanooga rate over Nashville.
1	$218.40	$273.60	$55.20
2	187.20	235.20	48.00
3	144.00	206.40	62.40
4	100.80	175.20	74.40
5	86.40	144.00	57.60
6	74.40	117.60	43.20

(See testimony of Jesse M. Smith, answer to interrogatory 12. (Record, pp. 231, 232.)

Judge Severens forcibly illustrates the great disparity between the Chattanooga and Nashville rate, as follows (Record, p. 371):

"It appears that, comparing the rates to Chattanooga and Nashville, although the distance to Chattanooga is

151 miles less than to Nashville, the charge on first-class freight to the former place is 25 per cent higher than to the latter; on second class it is 26 per cent higher; on third class it is 43 per cent higher; on fourth class it is 74 per cent higher; on fifth class it is 67 per cent higher, and on sixth-class 58 per cent. If the charges are reckoned by mileage, they are about 100 per cent higher on freight of the three lower classes from New York to Chattanooga than they are to Nashville, and over 67 per cent higher in the aggregate of rates for all the classes."

When these figures are considered we can not but agree with the Commission that, "*when the disparity between long and short distance charges reaches the proportions here exhibited, the inference is irresistible that the lesser rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the services rendered.*"

DISTANCE OR THE LENGTH OF THE HAUL AS IT AFFECTS THE REASONABLENESS OF RATES.

The length of the haul has a material bearing upon the reasonableness of rates, because the cost of the service of carriage depends largely, if not principally, on the length of the haul.

All the witnesses for the carriers admit that, other things being equal, the consumption of time is greater the greater the length of the haul;

That, other things being equal, the consumption of fuel is greater the greater the length of the haul;

That, other things being equal, the wear and tear on locomotives, cars, track, roadbed, etc., is greater the greater the length of the haul;

That, other things being equal, the cost of keeping a road in repair is greater the greater the length of the road;

That, other things being equal, it requires more locomotives and cars and more crews for the running of trains on a long road than on a short one;

That, other things being equal, distance adds to the cost of building roads, and therefore the fixed charges, such as interest on capital invested, taxes, etc., are greater the greater the length of the road; and

That the value of the service to the shipper, as a general rule, is greater the greater the length of the haul.

It is thus seen that not only the expense of the actual service of transportation, but ALSO THE FIXED CHARGES, such as interest on investment, etc., are directly dependent on distance. These expenses and charges are necessarily first to be determined in making a reasonable rate. Distance, therefore, is the most important and a controlling element in rate making.

The haul to Nashville being 151 miles longer than the haul to Chattanooga, the expense of the haul to Nashville must be to that extent greater than to Chattanooga,

and if, as witnesses for the road testify and as we are bound to infer in the absence of such positive testimony, the rates to Nashville pay the expense of the haul to Nashville and a *reasonable or proper remuneration* above that expense, then the materially higher rates to Chattanooga yield a remuneration very much greater than a reasonable remuneration in excess of the cost of transportation to Chattanooga, and are unquestionably excessive.

COMPARISON OF RATES PER TON PER MILE TO CHATTANOOGA WITH THE AVERAGE RECEIPTS PER TON PER MILE AND ESTIMATED COST PER TON PER MILE ON TRAFFIC IN GENERAL ON LINES OF THE DEFENDANTS AND OF CARRIERS ALL OVER THE COUNTRY.

The excessiveness of the Chattanooga rates is further indicated by a comparison of the rate per ton per mile yielded by those rates with the average receipts per ton per mile and estimated cost of carrying a ton a mile on lines of the defendants and on railroads throughout the country.

The rates *per ton per mile* on the six numbered classes for the haul of 848 miles from New York to Chattanooga are shown in the table below in cents and fractions of a cent.

Rates per ton per mile to Chattanooga.

Classes.	To Chattanooga.
	Cents.
1.....	2.68
2.....	2.31
3.....	2.02
4.....	1.72
5.....	1.41
6.....	1.15

Average of rates per ton per mile to Chattanooga, 1.88 cents.

The average receipts per ton per mile and the estimated cost of carrying 1 ton 1 mile for the year 1892 (when the order of the Commission was made), on roads in different sections of the country (embracing most of the defendants in this case), reported by these roads to the Interstate Commerce Commission, are shown in the table below (Record, p. 257).

Name of road.	1892.	
	Average receipts per ton per mile.	Estimated cost of carrying 1 ton 1 mile.
I.	*Cents.*	*Cents.*
1. Louisville and Nashville R. R	0.948	0.621
2. Nashville, Chattanooga and St. Louis Rwy	1.035	.599
3. Cincinnati, New Orleans and Texas Pacific Rwy	.779	.571

Name of road.	1892.	
	Average receipts per ton per mile.	Estimated cost of carrying 1 ton 1 mile.
II.	*Cents.*	*Cents.*
1. Pennsylvania R. R	.647	.448
2. New York, New Haven and Hartford R. R	1.747	1.425
3. Pittsburgh, Cincinnati, Chicago and St. Louis Rwy	.706	.551
4. Fitchburg R. R	.925	.712
5. West Shore R. R.[1]		
6. Lake Shore and Michigan Southern Rwy	.602	.416
7. Cleveland, Cincinnati, Chicago and St. Louis Rwy	.710	.481
8. New York, Chicago and St. Louis R. R.	.537	.438
9. New York Central and Hudson River R. R	.699	.518
10. Cumberland Valley R. R	1.285	1.058
11. New York, Philadelphia and Norfolk R. R	1.098	.885
III.		
1. East Tennessee, Virginia and Georgia Rwy	0.874	0.675
2. Norfolk and Western R. R	.545	.362
3. Richmond and Danville R. R	1.355	.929
4. Western and Atlantic R. R.[2]		

[1] Financial report filed. Operations included in those of New York Central and Hudson River R. R.

[2] No report filed. Operations included in those of Nashville, Chattanooga and St. Louis Rwy.

Name of road.	1892. Average receipts per ton per mile.	1892. Estimated cost of carrying 1 ton 1 mile.
	Cents.	*Cents.*
5. Central R. R. and Banking Co. of Georgia	1.356	.972
6. Georgia R. R. and Banking Co.[1]	.....	.....
7. Atlanta and West Point R. R	1.630	.931
8. Southern Rwy	.....	.....
9. Western Rwy. of Alabama	1.690	1.077

[1] Financial report filed. Operations included in those of Georgia R. R.

The average receipts per ton per mile and estimated cost of carrying 1 ton 1 mile, as shown in the above table, are on traffic in general—that is, on all classes of traffic.

Comparison will therefore be made of the figures in the above table with the average of the rates per ton per mile to Chattanooga on traffic in general—that is, on the six classes, which average is 1.88 cents.

This average of the rates per ton per mile to Chattanooga—1.88 cents—it will be seen, is *higher than the average receipts, etc., on all the roads named in the chart.*

It is more than *twice* as large as the average receipts per ton per mile on the following roads:

Cincinnati, New Orleans and Texas Pacific Railway.
Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.

West Shore Railroad.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York, Chicago and St. Louis Railroad.
New York Central and Hudson River Railroad.
East Tennessee, Virginia and Georgia Railway.
Norfolk and Western Railroad.

It is more than *three* times as high as the average receipts per ton per mile on the following roads:

New York, Chicago and St. Louis Railroad.
Norfolk and Western Railroad.

It is from two to four times as high as the estimated cost of carrying 1 ton 1 mile on the following roads:

Louisville and Nashville Railroad.
Nashville, Chattanooga and St. Louis Railway.
Cincinnati, New Orleans and Texas Pacific Railway.
Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.
Fitchburg Railroad.
West Shore Railroad.
Lake Shore and Michigan Southern Railway.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York, Chicago and St. Louis Railroad.
New York Central and Hudson River Railroad.
New York, Philadelphia and Norfolk Railroad.
East Tennessee, Virginia and Georgia Railway.
Norfolk and Western Railroad.

The average of the rates per ton per mile on the six classes to *Nashville* is 1.12 cents. The average of the rates to Nashville is greater, it will be seen, than the average receipts per ton per mile on the following roads:

Louisville and Nashville Railroad.
Nashville, Chattanooga and St. Louis Railway.

Cincinnati, New Orleans and Texas Pacific Railway.
Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.
Fitchburg Railroad.
Lake Shore and Michigan Southern Railway.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York, Chicago and St. Louis Railroad.
New York Central and Hudson River Railroad.
New York, Philadelphia and Norfolk Railroad.
East Tennessee, Virginia and Georgia Railway.
Norfolk and Western Railroad.
Western and Atlantic Railroad.

The average of these rates per ton per mile to Nashville, it also appears, is about *twice* as high as the average receipts per ton per mile on the following roads:

Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York Central and Hudson River Railroad.

And it is *more than twice* as large as the average receipts per ton per mile on the following roads:

New York, Chicago and St. Louis Railroad.
Norfolk and Western Railroad.

It will also be seen that it is *more than twice* the amount of the estimated cost of carrying one ton one mile on nearly *all the roads* in the table.

Section 20 of the act to regulate commerce requires carriers to make annual reports to the Interstate Commerce Commission, and among other items embraced in those reports are the average receipts per ton per mile

on traffic in general, and, up to the year 1894, the estimated cost of carrying one ton one mile. The figures in the above table, showing average receipts per ton per mile and estimated cost of carrying one ton one mile, are taken from the reports of the carriers made under the law to the Interstate Commerce Commission.

Counsel for the carriers, *appreciating the force of these figures*, attempted to show that this data is of no value in determining whether rates are or are not *excessive*, and with that view asked the witness J. M. Culp whether "the average receipts per ton per mile or the estimated cost of carrying 1 ton 1 mile, either jointly or separately, can be used as *the standard for railroad rate making*." The witness replied, "It can not, and is not." On cross-examination this witness testified as follows:

Recross-question 3. "Is not such data useful to some extent in determining whether an existing rate is or is not excessive?"

Answer. "It is useful in determining whether *all the rates* are excessive. In other words, the average receipts of a road per ton per mile might be so much that, taken in connection with other things, it might be held that the rates were excessive." (Record, p. 170.)

The witness testifies that such data is useful in determining whether "*all the rates* are excessive," and it *is to be noted that the question in the present case is whether the rates on all the six classes to Chattanooga are or are not excessive.*

This witness further testified that while the cost per ton per mile is estimated and is difficult to arrive at, the average receipts per ton per mile are easily ascertained and are the result of accurate calculation. *It further appears that this data is kept by roads for their own use and published in their own annual reports.*

While counsel for the roads attempts to discredit the usefulness of this data in shedding light upon the reasonableness or excessiveness of rates, yet he himself, with a view of showing that the proportions of the through rates to Nashville received by the Norfolk and Western Railroad, the East Tennessee, Virginia and Georgia Railway Company, the Western and Atlantic Railroad, the Central of Georgia Railway, and the Nashville, Chattanooga and St. Louis Railway were remunerative, introduces evidence that those proportions exceeded the "*estimated*" average cost per ton per mile on said roads, respectively, in 1892.

(See answer of T. S. Davant to interrogatory 9, Record, p. 151.)

This is a recognition, a practical admission by counsel for the carriers, that it is possible to ascertain the cost of carrying a ton a mile, and that this data is useful in determining whether rates are remunerative, and hence in determining their reasonableness.

In a brief filed in the circuit court counsel for the carriers virtually admits that this data is valuable as shedding light upon the question of the excessiveness of rates. He says:

"I used the *same data* to show that certain proportions of through rates to Nashville which are received by certain of the defendant carriers are "'REMUNERATIVE.'"

By the word "remunerative" counsel explains that he means "*any* remuneration over the additional cost of the movement of that particular traffic."

If this data is useful as showing whether rates yield *any* remuneration above the cost of service, does it not follow that it may also shed light upon the question as to whether or not the remuneration is excessive?

Counsel for the roads, in attempting to discredit this data, is confronted by the fact that it has been kept and recorded by the roads for their own use for a period long anterior to the passage of the act to regulate commerce, and is still so kept and recorded.

The question is, Why have they put themselves to this trouble, and of what use is this data to them?

Unquestionably for the very purpose for which it is being used in these cases—namely, to enable them to see whether their rates are too high or too low.

The argument of counsel for the carriers *goes too far.*

If his position in reference to this data is correct, it is of no value whatever for any purpose, and the carriers are *stultifying* themselves in making it out and keeping record of it.

We do not contend that these data indicate with mathematical accuracy what is a reasonable rate in a given case, but that the fact that rates yield rates per ton per mile *many times higher* than the average receipts per ton per mile of roads in general (embracing most of the defendants) is a circumstance, in connection with others, showing, or tending to show, that those rates are excessive.

The *receipts* are, of course, the result or outcome of the rates and may be, therefore, said to be an *index* to the rates.

OTHER THINGS BEING EQUAL, AS THE RATES ADVANCE THE RECEIPTS WILL INCREASE.

Chapter XVIII.

A PRIMA FACIE CASE OF EXCESSIVENESS OF CHATTANOOGA RATES MADE OUT.

All these matters to which we have referred in the preceding chapter make out, as we claim, a *prima facie* case of excessiveness in rates, and are sufficient to shift the burden of proof to the defendants.

NATURE OF TESTIMONY OFFERED BY CARRIERS TO SHOW REASONABLENESS OF CHATTANOOGA RATES.

As we have seen, the reasonableness in themselves of the Chattanooga rates was distinctly in issue before the Commission, and is in issue under the pleadings in the case before the court. The defendants, realizing that the burden is upon them, have introduced testimony to show the reasonableness of the Chattanooga rates.

The following testimony of J. M. Culp is a specimen of the proof introduced by counsel for the carriers to show the reasonableness of the Chattanooga rates. He asks:

Question 17. "State whether in your opinion the rates from New York and Boston to Chattanooga were just

or unjust, reasonable or unreasonable, and give your reasons for any opinion you may express."

Answer. "They were, in my *opinion*, certainly not unreasonably high. They were reasonably low. My reasons for this opinion are that *the property moved freely on these rates;* business was done and had been done under these rates at a profit; they were *lower than the property could be shipped between the same points by any other means of transportation;* and they were in line with the rates to Knoxville, Rome, Atlanta, and Dalton, and other points doing business in competition with this point." (Record, p. 159.)

(*a*) The first reason given is that the Chattanooga rates are reasonable because *traffic is moved under them.*

This is equivalent to saying that any rate is reasonable which is not *prohibitory.* A rate under which traffic will *not* move is prohibitory and "kills the goose that lays the golden egg."

There is a wide margin, manifestly, between a prohibitory rate and a reasonable rate. For example, *traffic may be worth, say, $100. The rate charged may be $90. In order to secure the $10 difference between the rate and the market value of the traffic, the shipper will ship under the $90 rate, although a reasonable rate might be only $50, or less.*

The alternative presented to the shipper is *something or nothing, "a half loaf or no loaf at all."* Therefore the traffic will move under excessive rates.

(*b*) The second reason given is that the Chattanooga rates are reasonable because "they are lower than the

property could be shipped between the same points *by any other means of transportation.*"

The other "means of transportation" referred to, it appeared on cross-examination, were WAGONS, CARTS, etc. *The inference sought to be drawn is that the Chattanooga rates, being less per ton per mile than wagon and cart rates for short hauls, are, therefore, not unreasonably high.*

It is difficult to realize that this *wagon or ox-cart argument* can be seriously insisted upon.

Comparison of a rail rate with a wagon or cart rate for the purpose of showing the reasonableness of the former is wholly valueless, for the following among other reasons:

1. Where a wagon or cart carries one ton of freight, a railroad carries thousands.

2. Where a wagon or cart carries freight one mile, a railroad carries it hundreds or thousands of miles.

3. Wagons and carts have no monopoly of transportation over a particular roadway.

When railways came into operation, however, they superseded other modes of transportation and obtained a practical monopoly as to hauls of any length. They have an absolute monopoly over their own roadbeds, whereas public highways for vehicles are free to all. It is this monopoly which, both in England and this coun-

try, has called for legislation regulating their rate charges. In the case of the Attorney-General *v.* B. & D. J. Ry. Co. (2 Eng. Railway and Canal Cases, pp. 132, 133) the Lord Chancellor said that the object of Parliament in its several enactments for the regulation of railways and their charges was to prevent "those who should get the monopoly of the carriage of the public from exercising that monopoly to the prejudice of individuals." Our act protects *localities* as well as individuals. (Sections 3 and 4, act to regulate commerce.)

4. Railroads operate under charters derived from the public granting them rights of way and other exclusive franchises, and hence, as said by Justice Brown in Union Pacific Company *v.* Goodridge (149 U. S., 680), are "*bound to deal fairly with the public, upon whose will they are dependent for their corporate existence.*"

There is no analogy whatever between transportation by rail and transportation in wagons and carts. The circumstances and conditions in the two cases are substantially dissimilar.

(*c*) The third reason given is that the Chattanooga rates are reasonable, because they are in line with the rates to Knoxville, Rome, etc.

What the rates to Knoxville, Rome, etc., are is not stated, and there is no proof whatever as to the reasonableness of those rates. This third reason can not be

held to be satisfactory, or, indeed, any ground for pronouncing the Chattanooga rates REASONABLE IN THEMSELVES.

This is the nature of the so-called proof offered by counsel for the carriers to show the reasonableness in themselves of the Chattanooga rates. *He does not make proof of the facts laid down by the courts as competent to prove the reasonableness of rates, although the knowledge of those facts is peculiarly in the possession of his witnesses, railroad officials.*

He yet strenuously insists that the Commission should make proof of those facts.

OPINIONS OF RAILROAD OFFICIALS.

Counsel for carriers relies mainly on mere *opinions* of railroad officials as showing the reasonableness of the Chattanooga rates.

These witnesses are the very men who have made and are responsible for the rates to Chattanooga. They are naturally strongly biased in favor of their own action, and *when they give their* OPINIONS *as to the reasonableness of these rates and as to other matters involved in these cases, those* OPINIONS *are to be viewed and weighed in the light of the fact that they are the opinions of interested parties, naturally strongly biased.*

It is claimed that railway traffic managers are experts, and that therefore their mere opinions are

competent evidence of the reasonableness of rates, although that is the very matter in issue for the courts and the Commission to determine.

In this connection we again quote as a part of our argument the following extract from the opinion of the circuit court of appeals in this case:

"It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates and to decide what discriminations are justified by the circumstances than courts. This can not be conceded so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the Federal courts. Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute." (Record, p. 415.)

Not only is the Interstate Commerce Commission "by reason of the experience of its members in this kind of controversy and their great opportunity for full information an expert tribunal," but it has decidedly the advantage of railway traffic managers in that *it is an unbiased, impartial tribunal.*

Chapter XIX.

BURDEN OF PROOF.

UNDER SECTION 4:

Where rates to shorter distance points are higher than to longer distance points the burden of proof is upon the carriers to show "a substantial dissimilarity of circumstances and conditions" justifying such higher rates. This is admitted by counsel for carriers.

UNDER SECTION 3:

The same is true where rates to different localities are shown under section 3 to be relatively unequal.

Departures from the long and short haul rule of section 4 are only a species of discrimination between localities, which are embraced in and would have been unlawful under section 3, although not specifically denounced in section 4. As said by Judge Severens in the opinion of the circuit court in this case:

"The long and short haul clause of section 4 is only one of the *specific* provisions employed for the general purpose of the act. The third section underlies the fourth and supplies the principles on which it rests."

UNDER SECTION 1:

Counsel for carriers insists that where rates are charged to be excessive in themselves, and hence in

violation of section 1, the burden of proof is upon the party making the charge.

Conceding that to be so where the charge is under section 1 alone, and there are no charges under sections 3 and 4, *we claim that the burden of proof has been shifted in these cases.*

The facts in evidence and relied upon by the Commission raise at least a *strong presumption* of the excessiveness of the rates to Chattanooga. (See Chapter XVII, *supra.*)

This presumption is sufficient to shift the burden of proof to the defendants.

In Wharton's Law of Evidence (sec. 367, 3d ed.) it is said "that where a creditor shows facts that raise a *strong presumption* of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on the debtor to explain it."

WHERE THERE ARE CHARGES UNDER SECTIONS 3 AND 4,

The excessiveness of the rates to the shorter-distance points is *material or relevant* to the issue presented by such charges.

If, for instance, the rates to one locality are excessive and to the other reasonable, this alone would constitute an undue preference in rates.

The *disparity* between the rates to two localities being shown, the burden is shifted to the carrier to justify its rates: and hence, in that case, it is incumbent upon the carrier to *show affirmatively the reasonableness of the rates to the points discriminated against.* It is involved in the issue.

Counsel for the carriers appears to *have realized* and *has practically admitted* the truth of this proposition by attempting to prove by all his witnesses, on direct examination, that the rates to Chattanooga are reasonable.

The Commission laid down the correct rule as to burden of proof in the case of McMorran *v.* Grand Trunk Railway of Canada (3 I. C. C. R., p. 261), as follows:

"When a rate is *prima facie* disproportionate or relatively unequal, the *onus* is on the carrier to justify its charges when challenged on these grounds. *The knowledge of the justifying circumstances and conditions relied on is peculiarly in the possession of the carrier.*"

In that case the Commission further says in this connection:

"The evidence does not show with any precision what these several expenses" (terminal expenses) "are, either in the aggregate or what would be a fair distribution of them per carload or per hundred pounds of freight. The defendants assume in their brief that the *burden* of showing these expenses was upon the petitioner; but this assumption is altogether erroneous. It would impose on persons conceiving themselves aggrieved by

carriers *a difficult and onerous rule of evidence.* It would be impossible for the petitioners to show such facts otherwise than by the *defendants' agents*, and it was clearly the province of the defendants to make them appear."

The rule that the burden is on a party to prove what is peculiarly in his knowledge, whether the proposition be affirmative or negative, is elementary law, and is laid down by all text writers on the subject.

Section 367, 3d ed., Wharton on "Law of Evidence."

Section 79, 15th ed., "Greenleaf on Evidence."

CONTENTION OF COUNSEL FOR CARRIERS THAT COMMISSION SHOULD MAKE PROOF OF THE MATTERS MENTIONED BY THIS COURT IN SMYTHE V. AMES AND OTHER CASES.

We have shown in the preceding chapter, XVIII, of this argument that counsel for carriers has assumed the burden of proof as to the reasonableness of the Chattanooga rates, and we *have shown the wholly unsatisfactory character of the proof he has introduced.*

While such is the character of the proof introduced in behalf of the carriers, it is yet, as stated in the preceding chapter, insisted that the Commission should make proof of the "cost of construction of the roads, the amount expended in permanent improvements, the amount and market value of their bonds and stocks,"

and other matters mentioned by this court in the case of Smythe *v.* Ames (169 U. S., 466), the Covington and Lexington Turnpike Company (164 U. S., 578), and other cases, as proper to be considered in determining the reasonableness of rates.

1. In the first place, if, as we contend, the burden of proof is upon the carriers, it was incumbent upon them to make proof of this character.

2. In the second place, these are matters peculiarly in the knowledge of the carriers, and, under the well-settled rule above stated, the burden was upon them to make proof of these matters.

3. In the third place, in the cases of the Joint Traffic Association, Smythe *v.* Ames, and the other cases, *there were involved entire systems of rates* and not rates to a particular locality.

Where *entire systems* of rates are in question, the cost of construction of roads and a reasonable return on such entire cost may shed light upon the reasonableness of an entire system of rates, but *where the reasonableness of the rates to one locality alone are involved such proof can be of little value.*

The rates to one locality may be grossly excessive and yet the entire system of rates may be unremunerative because of rates too low to other localities.

PUBLIC ENTITLED TO RATE NOT IN EXCESS OF REASONABLE WORTH OF SERVICE RENDERED.

It is to be noted that in Smythe *v.* Ames this court qualifies or limits its ruling, that the carrier is entitled to "a fair return upon the value of the property which it employs for the public convenience" by the statement that the "*public is entitled to demand rates not in excess of what the service rendered is reasonably worth.*"

These two propositions are to be taken together.

The right of the public, and every portion of the public, to reasonable rates is always to be considered as well as the revenue of the carrier. This proposition is laid down and enforced by this court in the case of Covington and Lexington Turnpike Company *v.* Sanford et al. (164 U. S., p. 578). In that case Mr. Justice Harlan, in delivering the opinion of this court, said:

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just to the public. * * * The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * So that the right of the public to use the plaintiffs' turnpike upon payment of such tolls *as in view of the nature and value of the services rendered by the company are reasonable* is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

CHAPTER XX.

NASHVILLE IS NO MORE IN TRUNK-LINE TERRITORY THAN IS CHATTANOOGA.—EXPENSIVE SOUTHERN TRANSPORTATION SHOULD AFFECT RATES TO NASHVILLE AS WELL AS TO CHATTANOOGA.

Counsel for the carriers argues this case upon the idea that Nashville is in the trunk-line territory, while Chattanooga is not. The truth is Nashville is no more in trunk-line territory than is Chattanooga. Trunk-line territory terminates on the south at the Ohio River points—Cincinnati, Louisville, and Evansville.

The length of the haul by the Louisville and Nashville line from Cincinnati *through expensive southern territory* to Nashville is only 40 miles less than from Cincinnati, via the Cincinnati, New Orleans and Texas Pacific Railway, to Chattanooga.

The route through Chattanooga, over which "*the vast majority*" (Record, p. 126) of the Nashville traffic passes to Nashville, is *through expensive southern territory* from Hagerstown, Bristol, Alexandria, or Norfolk, or from the South Atlantic ports—Charleston, Savannah, etc.—and, as we have seen, *the haul through this southern territory by these routes is 151 miles longer to Nashville than to Chattanooga.*

C A N A D
WASHINGTON
OREGON
MONTANA
NORTH DAKOTA
LAKE SUPERI
VII
WYOMING
SOUTH DAKOTA
WISCONSIN
VI
NEBRASKA
IOWA
ILLINOIS
X
NEVADA
UTAH
COLORADO
KANSAS
MISSOURI
VIII
INDIAN TERRITORY
ARKANSAS
ARIZONA
NEW MEXICO
TEXAS
IX
LOWER CALIFORNIA
GULF OF CALIFORNIA
TERRITORIAL GROUPS
ADOPTE
INTERSTATE COM
STATISTIC
FOR
COMPILATION OF
Scales
Miles
Kilometers

TERRITORIAL GROUPS OF THE UNITED STATES
ADOPTED BY THE
INTERSTATE COMMERCE COMMISSION
STATISTICIANS OFFICE
FOR THE
COMPILATION OF RAILWAY STATISTICS

Scales

Counsel for the carriers calls the attention of the court with great earnestness to the well known fact that rates are higher in what is known as southern territory than in trunk-line territory and in the East. In order to impress that fact upon the mind of the court he exhibited certain charts illustrating the difference between "earnings from freight service," "earnings from passenger service," "density of passenger traffic," "density of freight traffic," and "capital upon which dividends are paid," on railways in certain territorial groups adopted by the Interstate Commerce Commission for the compilation of railway statistics.

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Annexed is a map showing these territorial groups.

The diagrams presented to the court by counsel for the carriers relate to Groups II, III, IV, and V. It will be seen that Groups IV and V embrace the territory known as southern territory, to wit, territory east of the Mississippi and south of the Ohio and Potomac rivers; and that Groups II and III embrace trunk-line and eastern territory, or territory east of the Mississippi and north of the Ohio and Potomac rivers.

From an examination of this map it will be seen that traffic from Boston, New York, Philadelphia, and Baltimore, in Eastern territory (Group II), which goes to Nashville by the route via Chattanooga *passes for the most part through Southern territory* (Groups IV and

V). If such traffic goes by ocean to the South Atlantic ports—Charleston, Savannah, etc.—*the entire rail transportation is through Southern territory to Nashville.* If it goes by the all-rail lines, *nine-tenths or a larger proportion of the haul to Nashville is through Southern territory.*

When it goes by either the all-rail or the ocean and rail routes, it passes through Chattanooga to Nashville, and there is consequently 151 miles longer haul through this *expensive* Southern territory to Nashville than to Chattanooga, and the uncontradicted testimony before the court (Record, p. 126) is that the "vast majority" of the Nashville traffic goes by that route.

The small portion of the Nashville traffic which goes by the Cincinnati route enters Southern territory at Cincinnati and passes through Southern territory on to Nashville.

In view of these facts, it is difficult to see how the expensiveness of transportation through Southern territory justifies lower rates for the haul through Chattanooga to Nashville than to Chattanooga. *The expensiveness of Southern transportation should affect rates to Nashville to as great an extent as it affects rates to Chattanooga, if not to a greater extent.*

CHAPTER XXI.

THE PRESENT CASE STRONGER THAN EITHER THE "ALABAMA MIDLAND CASE" OR THE "SOCIAL CIRCLE CASE." THESE CASES DISTINGUISHED.

1. *The Alabama Midland case.*—The present case is distinguishable from the Alabama Midland case in *four material particulars.* In the latter case competition by the Alabama River from Montgomery to Mobile, as well as rail competition, was set up as justifying lower rates from Eastern seaboard cities to Montgomery, the longer distance point, than to Troy, the shorter distance point. The circuit court, the circuit court of appeals, and this court all recognized and cited in their respective opinions as material, if not controlling, facts in that case—

(*a*) That the Alabama River competition had reduced the rail rates "TO THE LEVEL OF THE LOWEST PRACTICAL PAYING WATER RATES."

(*b*) That the Alabama River was "OPEN ALL THE YEAR."

(*c*) That the Alabama River "was capable, if need be, of bearing to Mobile on the sea the burden of all

the goods of every class that passed through or from Montgomery."

(*d*) That there were "MANY MORE RAILWAY LINES running to and through Montgomery, connecting with all the distant markets, than ran through or to Troy."

In the opinion of this court in the Alabama Midland Case these four facts, as found by the courts below, are recited in quotations from the opinions of those courts, and *are thus recognized as material.* (Interstate Commerce Commission *v.* Alabama Midland Railway Co., 168 U. S., p. 171; 69 Fed. Rep., p. 227; 41 U. S., App., p. 453.)

The reverse situation exists in the present case.

(*a*) The so-called competition of the Cumberland River has not reduced the rail rates to "the level of the lowest practical paying water rate," but the RAIL RATES ARE ON AN AVERAGE MORE THAN THREE TIMES AS HIGH AS THE CUMBERLAND RIVER RATES.

(*b*) The Cumberland River is not "open all the year," but only about eight months in the year, and then only for "very light draft steamers."

(*c*) The Cumberland River is not capable of bearing to Nashville "the burden of all the goods of every class that pass to or from" Nashville. During four months of the year it is not navigable at all, and the balance of the time only navigable by "very light draft steamers."

(*d*) There are not "many more railways that run to and through" Nashville than run to and through Chattanooga, but, on the contrary, nine railways run to and through Chattanooga while only two run through and to Nashville.

This latter fact—that there were more lines of road actually reaching Montgomery than entered Troy—was commented upon with great stress by counsel for the roads *as justifying lower rates to Montgomery than to Troy.* No reason appears why this contention, if sound in the Alabama Midland Case, should not also be sound in the present case.

2. *Social Circle Case.*—In the Social Circle Case higher rates were charged from Cincinnati to Social Circle; the shorter distance point, than for the longer haul through Social Circle on to Augusta. The defense was water and rail competition at Augusta. This plea was found by the Commission to be not sustained, and an order issued that the rates to Social Circle should not be higher than those to Augusta. *The order of the Commission was affirmed by the circuit court of appeals and by the Supreme Court.* (162 U. S., p. 184.)

In the Social Circle Case no complaint was made by any merchant or citizen of Social Circle, and no injury to Social Circle was proven or alleged, and Social Circle was a small local, strictly noncompetitive station on the Georgia

Railroad. In these respects the present case is differentiated from, and is stronger than, the Social Circle Case. Complaint is made in behalf of Chattanooga by its Board of Trade; *positive injury to Chattanooga is proven by the testimony of her leading merchants, and Chattanooga is shown to be a competitive point as well as Nashville.*

CHAPTER XXII.

CONTENTION THAT THIS CASE SHOULD BE SENT BACK TO THE COMMISSION.

THIS LEFT TO THE DISCRETION OF THE COURTS. CONSIDERATIONS WHICH SHOULD CONTROL THIS DISCRETION IN THE PRESENT CASE.

DISTINCTIONS BETWEEN THE PRESENT CASE AND THE "BEHLMER CASE."

THE CASE IN COURT A PROCEEDING DE NOVO.

Counsel for the carriers contends that this case should be sent back to the Commission for reinvestigation or readjudication because of the error of the Commission in holding that it could not consider competition by carriers subject to the act to regulate commerce except under the proviso to the fourth section. In support of this contention he relies upon the decision of this court in Texas and Pacific Railway Co. *v.* Interstate Commerce Commission (162 U. S., 239), known as the "Import case"—in which, it is to be noted, *the case was not sent back to the Commission*—and upon the action of this court, *sending the case back to the Commission*, in the case of the Louisville and Nashville R. R. Co. *v.* Behl-

mer, decided at the present term, and known as the "Behlmer case." There are material distinctions, relating to this question, between the "Behlmer case" and the present case.

A MATTER OF DISCRETION WITH THE COURTS.

Before considering these distinctions attention is called to the fact that in the "Import case," one of the cases relied upon by counsel for carriers, this court held that it was within the *discretion* of the court in a case like the present to either determine the case itself or send it back to the Commission. The language of the court on this point is as follows:

"As the act provides that, on such hearing" (that is, a hearing by the court of a petition by the Commission for the enforcement of an order), "the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated, we think it plain that if, in such a case, the Commission has failed in its proceedings to give notice to the alleged offender, or has *unduly restricted its inquiries* upon a mistaken view of the law, the court ought not to accept the findings of the Commission as a legal basis for its own action, but *should either inquire into the facts on its own account* or send the case back to the Commission to be lawfully proceeded in." (162 U. S., p. 239.)

The court, then, may, in cases of this character "*either inquire into the facts on its own account or send the case back to the Commission to be lawfully proceeded in.*"

CONSIDERATIONS WHICH SHOULD INFLUENCE THE COURTS IN THE EXERCISE OF THIS DISCRETION.

1. *The statute requires that these cases be determined "speedily."*

In the first place, we think that in the exercise of this discretion the courts should take into consideration, among other matters, the fact that the statute (section 16 of the act to regulate commerce) requires the courts to hear and determine these cases "*speedily as courts of equity.*" It has now been *ten years* since the complaint before the Commission from which this case originated was filed, and the case has been *seven years* in the courts. To now direct it to be begun anew before the Commission will well nigh amount to "*a denial of justice*," and it is manifest that such direction should not be given unless it be absolutely essential to the ends of justice. The mandate of the statute to the courts is "that they do *justice speedily.*" The two ideas, *justice and speed*, are interwoven in this enactment, because Congress recognized that delay in these cases would result in irremediable *injustice.*

2. *The controlling consideration should be whether injury which the courts can not remedy has been done the carriers by the error of the Commission.*

The consideration, however, which should control the court in determining how it shall exercise its dis-

cretion to "either inquire into the facts on its own account or send the case back to the Commission" should be, we think, whether any injury has been done the defendants by the error of the Commission which the courts can not remedy by adjudicating the matter themselves.

In this connection the distinction is to be noted between the "findings of fact" of the Commission and its conclusions. The findings of fact of the Commission are made by the statute "*prima facie* evidence before the courts of the matters therein stated;" there is no such provision as to the conclusions of the Commission.

It will be observed that in the passage from the opinion of this court in the "Import case," which we have read, it is held that if the Commission "*has unduly restricted its inquiries*" (that is, inquiries into the facts) "upon a mistaken view of the law, the court ought not to accept the findings" (that is, findings of fact) "of the Commission as a legal basis for its own action, but should either inquire into the facts on its own account or send the case back to the Commission to be lawfully proceeded in." The court does not hold that where the Commission has committed an error of law or an error in its conclusions from the facts the case should be sent back to the Commission. It is only where the Commission has "unduly restricted its inquiries" into the facts upon a mistaken view of the law that the case

may be sent back to the Commission, and *even then it is left discretionary with the court to pursue that course or to proceed to inquire into the facts on its own account.*

If it appears that the Commission has made full findings of fact, on all the matters in issue before it, but has made a mistake in its conclusions from those facts or as to the law applicable to those facts, then the courts can correct this error without injury to the carriers, and in such case it is the duty of the courts to determine the matter without sending the case back to the Commission, thus avoiding the vexatious delay and expense incident to the latter course.

The error of the Commission in this case was not in failing to find the facts fully as to competition and the other matters in issue before it, but was purely an error of law. The Commission held that it could not give weight to competition by carriers subject to the act except under the proviso to the fourth section, and this it has been since held by this court is an error but it is an error of law which it is peculiarly the function of the courts to correct.

This error of law can not be claimed or shown to have in any way or to the slightest extent influenced the Commission in its findings of fact. The Commission did not "unduly restrict its inquiry" into the facts, and it is contrary to the scheme of the statute that the courts should send a case back to the Commission for the correction of an error of law.

COMPETITION AN ISSUE BEFORE THE COMMISSION AND FACTS RELATING THERETO FULLY FOUND.

On an examination of the answers of the carriers to the complaint before the Commission it will be found that the gist of their defense, if not their sole defense, was competition, and all the testimony, both of the carriers and the complainant, before the Commission related to this defense. On an examination of the report and opinion of the Commission it will be found that there is a full, specific, and painstaking statement of all the facts in evidence bearing upon the issue raised by the plea of competition, whether the competition be by carriers subject to the act or by carriers not subject. Those facts are stated in the report and opinion of the Commission, under the heading "Facts," and will be found on *pages from 41 to 51*, inclusive, of the record. It is not probable that on a reinvestigation the Commission could state the facts more exhaustively than they have already done.

THE COMMISSION DID CONSIDER AND PASS UPON THE ONLY COMPETITION SET UP BEFORE IT.

An examination of the report and opinion of the Commission will further show that while the Commission erroneously held it could not, in arriving at its conclusions, give weight to competition by carriers subject to the act, it did consider and pass upon the only competition set up by the carriers before it. That competition was by the line from the eastern seaboard

cities via Cincinnati to Nashville with the line involved in this case from those cities via Chattanooga to Nashville. It was claimed on the part of the carriers that the rates by this line via Cincinnati to Nashville were forced down by river competition from Cincinnati to Nashville over the Ohio and Cumberland rivers, and that the line involved in this case through Chattanooga to Nashville had to meet these rates thus forced down. This, as we have heretofore shown, was in reality the only competition set up before the Commission, and the facts relating to this competition are fully set forth in *paragraph 7* of the report and opinion of the Commission (see Record, p. 48), and were duly considered and passed upon by the Commission in the succeeding paragraph, wherein the Commission announces its conclusion from those facts as follows:

"The lower rates accepted by the carriers engaged in the transportation of Eastern merchandise to Nashville via Chattanooga are not forced upon them by any water competition at the former place."

(See paragraphs 8 and 7, report and opinion of the Commission, Record, p 49).

BOTH THE LOWER COURTS CONSIDERED AND GAVE DUE WEIGHT TO THE TESTIMONY RELATING TO COMPETITION.

A large amount of additional testimony relating to competition—larger in amount than that taken before the Commission—was adduced before the court in this

case. Both the courts below duly considered and weighed all this testimony, both that before the Commission and that taken in court; they both recognized the error of the Commission in holding that competiton by carriers subject to the act could not be given weight to except under the proviso to the fourth section; and both based their decisions solely upon the facts in evidence relating to competition, which facts were presented to them more fully than to the Commission.

The carriers have thus had their "day in court" as to their defense of competition, and the error of law committed by the Commission has been fully cured.

DISTINCTIONS BETWEEN THE CASE AT BAR AND THE "BEHLMER CASE."

In all these respects the "Behlmer case" differs from the case at bar:

(1) In the "Behlmer case" the Commission did not undertake to make findings of fact relating to competition, but simply stated that the answers of the defendants set up competition, giving the averments in those answers on this subject, and then briefly disposed of the case by the statement that the competition set up was by carriers subject to the act, and therefore could not be considered except under the proviso to the fourth section.

(2) The Commission committed the further error in the "Behlmer case," as decided by this court, in holding that it could not consider competition of markets, but could only consider the competition of carriers engaged in the transportation of the traffic involved in the case from Memphis to Charleston. *There is no competition of markets set up in the present case.*

(3) The conclusions of the Commission in the "Behlmer case" were based solely on these errors, and the *circuit court of appeals, from whose decree in favor of the Commission the case was brought to this court on appeal, sustained these errors of the Commission and based its decree largely on those errors.*

As we have seen in the case at bar, neither the circuit court nor the circuit court of appeals sustained the error of the Commission, but examined, weighed, and gave full consideration to the testimony relating to competition and based their decrees thereon. This distinction between the "Behlmer case" and the case at bar is noted several times by this court in its opinion in the "Behlmer case." At one point in that opinion this court says:

"It follows that the decree of the circuit court must be reversed unless it be the duty of this court to examine the evidence, *which was not passed on by the Commission or the circuit court of appeals.*" * * *
(Page 12, pamphlet opinion.)

At another point in that opinion this court says:

"We have shown, in our previous analysis of the action of the Commission and of the views expressed by the circuit court of appeals, that whilst the facts were considered *in so far as was necessary to determine that the competition was due only to certain particular causes, the result of the competition was not examined in order to ascertain the substantial materiality of its operation on traffic and rates.* And this, because *both the Commission and the circuit court of appeals* determined that competition of the particular character which they found relied on to be, as a matter of law, however weighty in its operation on rates, was not legally entitled to be considered in reviewing the action of the carriers."
(Bot. p. 13, top p. 14, pamphlet opinion).

And again:

"If, then, we are to undertake the duty of weighing the evidence in this record, we would be called upon *as a matter of original action*, to investigate all these serious considerations which were shut out from view by the Commission, and *were not weighed by the circuit court of appeals*, because *both the Commission and the court erroneously construed the statute.*"
(P. 15, pamphlet opinion.)

(4) In the Behlmer case very little, if any, testimony was adduced before the court in addition to that before the Commission.

STATUTE PROVIDES FOR THE TAKING OF ADDITIONAL TESTIMONY BEFORE THE COURTS.

It is material to note that section 16 of the act to regulate commerce, which authorizes suits of this kind by the Commission, provides that the courts, if they deem it necessary to enable them to do justice, shall

have power "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment." It is under this clause of the law that new and additional testimony is taken in these cases before the courts, *as was done in the present case.* It is manifest that the judgment or conclusion of the Commission from the testimony before it may be of little value after the case has been reopened and new testimony taken in the courts. A new case may be made, and in the "Alabama Midland case" the circuit court held that, because of the new testimony before it, the case as presented to the Commission was different from the case as presented to the court.

The mandate of the statute is that the courts shall do justice according to equity. If, when the facts are fully found by the Commission on the testimony before it, and new testimony is taken before the courts, the courts can not do justice according to equity on the facts thus more fully presented to the courts without the assistance of the judgment of the Commission on *a part of those facts*, then it will be the duty of the court to direct that the case be sent back to the Commission.

We do not think the court needs assistance from any source in doing justice according to equity, the facts relating to the matter in controversy being fully presented.

THE CASE BEFORE THE COURT IS A PROCEEDING DE NOVO.

Section 16 of the act to regulate commerce provides for the institution of a proceeding *de novo* based upon new pleadings and new evidence, and the courts have uniformly held, when the question has been before them, that these suits are new and independent proceedings in equity, and that it is the duty of the courts to do justice "*on the entire body of the evidence*" *before them.*

In construing section 16 of the law the circuit court said in the "Social Circle Case:"

"The Commission denies the power of this court to hear the case upon any other issues, pleadings, or facts than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues or questions should be raised or other evidence taken. The language of the act of Congress does not support this contention. * * * The question may be considered as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission." (56 Fed. Rep., pp. 934, 935.)

In the case of the Interstate Commerce Commission *v.* Cincinnati, New Orleans and Texas Pacific Railway Company et al. Judge Sage, in delivering the opinion of the circuit court at Cincinnati, said:

"The court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity,

but in such manner as *to do justice in the premises.* It is so provided in section 16 of the act. The intention of Congress evidently was to vest in the court *a large discretion.*" (64 Fed Rep., pp. 984–985.)

In the case of Shinkle, Wilson & Kreis Co. et al. *v.* Louisville and Nashville Railroad Company et al., in the United States circuit court at Cincinnati, Judge Lurton, in the opinion delivered by him, says:

"If it shall then" (that is, on final hearing in a suit in court to enforce an order of the Commission) "appear *on all the evidence heard and submitted* that the order of the Commission was lawful and reasonable and that it had been violated, it shall be lawful for such court to issue a writ of injunction or other proper process to prevent further disobedience of such order. Now, it is well settled that *the court is not the mere executioner of the orders of the Commission.* The suit in this court is an *original and independent proceeding.* This court is not confined to a mere examination of the matter as heard by the Commission. It proceeds to hear the complaint *de novo.* (62 Fed. Rep., p. 693.)

The duty and power of the court to "inquire into the facts on its own account" and try the case *de novo* are recognized in the "Import Case" (162 U. S., 239).

In the case of the Interstate Commerce Commission *v.* Alabama Midland Railway Company et al. (168 U. S., 175) the Supreme Court says:

"It has been uniformly held by the several circuit courts and the circuit courts of appeal in such cases that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission *to make the particular order* in question, but that additional evidence may be

put in by either party, and that the duty of the court is to decide *as a court of equity upon the entire body of evidence.*"

It thus appears that the suit before the court is, in the language of Judge Lurton, "*an original and independent proceeding,*" and "*the court is not the mere executioner of the orders of the Commission;*" that, in the language of Judge Sage, the court is "*to do justice in the premises as a court of equity,*" and to this end is invested by Congress with "*a large discretion;*" and in the language of this court in the "Alabama Midland case," that the court is "*to decide as a court of equity upon the entire body of the evidence, and is not restricted to a consideration merely of the power of the Commission* TO MAKE THE PARTICULAR ORDER IN QUESTION."

In the present case, Judge Severens, delivering the opinion of the circuit court, after noting that the Commission had committed the error of holding that it could not give weight to competition by carriers subject to the act except under the proviso, says:

"In this undoubtedly the Commission was in error. A contrary doctrine is now well established. But this error is not material. The legal reason given may be wrong and the order right if upon the facts the latter should be found by the court to be warranted by law. Nor can it affect the duty of the court if the Commission had founded its order upon one provision of the act and the facts brought the case within some other. The question, therefore, is whether the order made was a lawful one in the circumstances as they are made to appear."

(Record, p. 370.)

THE CARRIERS PRACTICALLY IGNORED THE PROCEEDINGS BEFORE THE COMMISSION.

Taking advantage of the provision in section 16 of the law, to which we have referred, authorizing the courts to take new and additional evidence in these cases, the carriers almost invariably "reserve their fire," or, in the language of Senator Edmunds, in the "Alabama Midland case," "lie by," until the cases are before the courts. They introduce comparatively little evidence before the Commission, and wait to bring in the bulk of their testimony before the courts.

The present case is an illustration of this. The evidence in behalf of the carriers taken in court is many times larger than that taken before the Commission. This, too, notwithstanding this practice had received the condemnation of this court in Texas Pacific Ry. Co. *v.* Interstate Commerce Commission (162 U. S., p. 196), in which it is held that the facts of a case should be fully "disclosed to the Commission."

CHAPTER XXIII.

CLASSIFICATIONS.

Rates to Chattanooga are governed by the Southern freight classification and rates to Nashville by the official classification.

(Deposition of Jesse M. Smith, answer to interrogatory 11, Record, p. 230.)

It is testified by Van Den Berg and Guilladeau, witnesses for the roads, that as to some articles the official classification rules higher than the Southern—in other words, for instance, that an article may be in the fifth class under the Southern classification, while it is in the third class under the official classification. From this it was intended that the court should infer that such an article would take a higher rate under the official classification to Nashville than under the Southern classification to Chattanooga.

It will be found, however, that the rates on the six classes to Chattanooga are so much higher than the rates on the six classes to Nashville that an article may be in a lower class

under the Southern classification than under the official classification, and yet have a higher rate to Chattanooga under the Southern classification.

For the purpose of comparison in this connection, below are given the rates, in cents per hundred pounds, on the six classes to Chattanooga and to Nashville.

Classes.	To Chattanooga.	To Nashville.
1	1.14	0.91
2	.98	.78
3	.86	.60
4	.73	.42
5	.60	.36
6	.49	.31

It will be seen from the above table of rates that the second-class rate to Chattanooga is higher than the first-class rate to Nashville; that the third-class rate to Chattanooga is higher than the second-class rate to Nashville and nearly as high as the first-class rate to Nashville; that the fourth-class rate to Chattanooga is higher than the third-class rate to Nashville and nearly as high as the second-class rate to Nashville; that the fifth-class rate to Chattanooga is higher than the fourth-class rate to Nashville and as high as the third-class rate to Nashville, and that the sixth-class rate to Chattanooga is higher than the fourth and fifth class rates to Nashville.

The witness Guillandeau testifies that coffee and sugar are in the sixth class under the Southern classification and fourth class by the official classification.

If this be a fact, coffee and sugar would still have a higher rate to Chattanooga, because sixth rate under the Southern classification is 49 cents, while the class 4 rate under the official classification is only 42 cents.

Coffee is, however, in class 4 under both classifications, and the rate to Nashville is 42 cents, while to Chattanooga it is nearly twice as high—73 cents.

(Deposition of Jesse M. Smith, answer to interrogatory 11, Record, pp. 230, 231.)

The fact appears to be, as testified by the witness Jesse M. Smith in answer to interrogatories 13 and 14, that there are a large number of articles which are placed in the same class in both classifications; that there are some articles which are classed higher under the official classification than under the Southern, and some that are classed higher under the Southern classification than under the official; *but even where articles are classed higher under the official than under the Southern classification they still have lower rates under the official classification than under the Southern.*

(Deposition of Jesse M. Smith, answer to interrogatories 13 and 14, Record, pp. 252, 255.)

The principal articles shipped to Chattanooga from Eastern seaboard cities are *dry goods*, *boots* and *shoes*, *drugs* and *medicines*.

(*Depositions of McGill, Paine, Snow, Merriam, Timothy, and Dobbs, answers to interrogatory 25* Record, pp. 243, 245, 247, 253.)

These articles are all in the same class—class 1—in both the Southern and official classifications. (*Deposition of Jesse M. Smith, answer to interrogatory 11*, Record, pp. 230, 231.) They therefore take $1.14 rate to Chattanooga and a 91-cent rate to Nashville.

Jesse M. Smith, in answer to interrogatories 14, 15, and 16 (Record, pp. 232–234), gives the statements contained in the following three tables.

TABLE 1.—*Statement showing certain articles classed lower in official than in Southern classification, the rates on such articles from New York to Chattanooga and Nashville, and the differences in favor of Nashville.*

Articles.	From New York—				Difference in favor of Nashville.
	To Chattanooga.		To Nashville.		
	Southern classification.	Rate per 100 lbs.	Official classification.	Rate per 100 lbs.	
		Cents.		*Cents.*	*Cents.*
Cigars and cigarettes, boxed (not carded or strapped)	(1)	342	D. 1	182	160
Tobacco, plug, in boxes, any quantity	1	114	3	60	54
Same, released	2	98	3	60	38
Tobacco, leaf, in cases, any quantity	3	86	4	42	44
Chinaware, fine, in barrels or casks, any quantity	D. 1	228	2	78	150
Cheese, in boxes or casks, l. c. l., not released	1	114	3	60	54
Crockery, in barrels, l. c. l	1	114	4	42	72
Crockery, in barrels, c. l	1	114	5	36	78
Same, released, l. c. l	2	98	4	42	56
Same, released, c. l	2	98	5	36	62
Hardware, n. o. s., boxed, any quantity	2	98	3	60	38
Pickles, in glass, c. l	3	86	5	36	52
Same, released, c. l	4	73	5	36	37
Starch, in bags, l. c. l	2	98	4	42	56
Starch, in boxes, l. c. l	3	86	4	42	44
Starch, c. l	5	60	6	31	29
Tinware, n. o. s., c. l	2	98	4	42	56
Typewriters and caligraphs, boxed or crated, c. h	1	114	3	60	54

[1] Three times class 1.

TABLE II.—*Statement showing certain articles classed lower in the Southern than in the official classification, the rates on such articles from New York to Chattanooga and Nashville, and the differences in favor of Nashville.*

Articles.	From New York—				Difference in favor of Nashville.
	To Chattanooga.		To Nashville.		
	Southern classification.	Rate per 100 lbs.	Official classification.	Rate per 100 lbs.	
		Cents.		*Cents.*	*Cents.*
Agricultural implements, c. l.	6	49	5	36	13
Cotton piece goods	5	60	3	60	.....
Coffee, single sacks, l. c. l.	4	73	4	42	31
Coffee, single sacks, c. l	4	73	6	31	42
Coffee, double sacks, l. c. l.	6	49	4	42	7
Coffee, double sacks, c. l.	6	49	6	31	18
Sugar, n. o. s., in barrels, l. c. l.	6	49	4	42	7
Sugar, n. o. s., in barrels, c. l.	6	49	6	31	18
Crackers, c. l	5	60	4	42	18
Handles, wooden, n. o. s	6	49	5	36	13
Nails and spikes, in kegs, l. c. l.	6	49	4	42	7
Nails and spikes, in kegs, c. l.	6	49	5	36	13
Leather, in boxes, l. c. l	3	86	2	78	8
Molasses, in barrels or hogsheads, l. c. l.	6	49	4	42	7
Molasses, in barrels or hogsheads, c. l	6	49	5	36	13

TABLE III.—*Certain articles given a special commodity rate of 85 cents per hundred pounds from New York to Nashville, but charged the class 1 rate of $1.14 per hundred pounds to Chattanooga.*

"Blankets, boots and shoes, buttons, carpets, clothing, collars, combs, comfortables, corsets; drugs, n. o. s.; dry goods, n. o. s.; fans, folding; gloves, hats, caps, hosiery, matting, medicine, millinery, notions, pins, rugs, shirts, silks, suspenders, table oilcloth, thread, umbrellas, underwear, waddings."

"The special rate New York to Nashville on the above articles is 85 cents per hundred pounds. Nearly all of these articles are in first class in the southern classification, and the rate to Chattanooga on same would therefore be $1.14 per hundred pounds."

Rate on above articles per minimum carload of 24,000 pounds to Nashville	$204.40
Rate per minimum carload of 24,000 pounds to Chattanooga	273.60
Excess of Chattanooga rate	69.20

THE CHATTANOOGA MERCHANTS TESTIFY THAT THE BULK OF THE TRAFFIC FROM EASTERN SEABOARD CITIES TO CHATTANOOGA CONSISTS OF DRY GOODS, BOOTS AND SHOES, DRUGS AND MEDICINES, WHICH ARE IN CLASS 1 IN BOTH CLASSIFICATIONS, AS SEEN BELOW. (Record, pp. 243, 244.)

J. M. Smith testifies that a few of the principal articles in each class of the two classifications are as follows (Record, pp. 230, 231):

First class:
- Dry goods, n. o. s.
- Boots and shoes.
- Tobacco.
- Drugs and medicines, n. o. s.
- Rubber goods, n. o. s.
- Musical instruments, n. o. s.

Second class:
- Saddlery, n. o. s.
- Glassware, common, n. o. s.
- Hardware, n. o. s., boxed.
- Matting, n. o. s.
- Mills, n. o. s.
- Tinware, n. o. s.

Third class:
- Cordage and twine.
- Machinery and machines, n. o. s., l. c. l.
- Stoves, n. o. s., stove furniture, and hollow ware, l. c. l.
- Bicycles, k. d., c. l.
- Wire, n. o. s.
- Leather, in rolls or boxes, l. c. l.

Fourth class:
- Rope, n. o. s., l. c. l.
- Canned goods, n. o. s., l. c. l.
- Coffee, green, single sacks.
- Dye, liquid, n. o. s., in barrels.
- Handles, n. o. s., boxed or crated, l. c. l.
- Cotton-seed oil mills.

Fifth class:
- Cotton piece goods.
- Rope, wire, l. c. l.
- Canned goods, n. o. s., c. l.
- Stoves, n. o. s., stove plates, stove furniture, and hollow ware, c. l.
- Tin plate, in boxes, l. c. l.
- Roofing felt, in bundles or rolls.
- Babbitt metal, in boxes, barrels, or casks.

Sixth class:
- Rope, n. o. s., c. l.
- Cement, n. o. s., in barrels or sacks, l. c. l.
- Coffee, green, in double sacks.
- Handles, n. o. s.
- Molasses and sugar, in barrels or hogsheads.
- Paper for the manufacture of bags, in rolls, l. c. .
- Soap, common, in boxes.

Official classification.

First class:
- Dry goods, n. o. s., in bales or boxes, l. c. l.
- Boots and shoes, in boxes, l. c. l.
- Drugs and medicines, n. o. s., l. c. l.
- Earthenware and crockery, l. c. l.
- Vehicles, l. c. l.
- Saddlery, boxed, n. o. s., l. c. l.
- Sewing machines, s. u., boxed or crated, l. c. l.

Second class:
- Spice, l. c. l.
- Leather, l. c. l.
- Printing paper, n. o. s., l. c. l.
- Machines and machinery, n. o. s., crated or boxed, l. c. l.
- Matting, l. c. l.

Third class:
- Bags or bagging, burlaps or gunny, in bales or rolls.
- Cotton bagging, l. c. l.
- Hardware, n. o. s., l. c. l.
- Cotton piece goods, l. c. l.
- Vehicles, n. o. s., c. l.
- Printing paper, l. c. l.

Fourth-class:
- Coffee, l. c. l.
- Sugar, l. c. l.
- Horseshoes, l. c. l.
- Matting, n. o. s., c. l.
- Leather, c. l.
- Sewing machines, c. l.
- Wall plaster, n. o. s., l. c. l.

Fifth class:
- Agricultural implements, c. l.
- Axle grease, c. l.
- Babbitt metal, c. l.
- Printing paper, n. o. s., and newspapers, c. l.
- Machines and machinery, n. o. s., c. l.
- School slates, c. l.

Sixth class:
- Coffee, c. l.
- Grain and grain products, c. l.
- Plaster, wall, n. o. s., c. l.
- Rails, old and new, c. l.
- Roofing tile, c. l.
- Sugar, c. l.

CHAPTER XXIV.

INCREASE IN POPULATION OF NASHVILLE AND CHATTANOOGA FROM 1860 TO 1890.

THE INCREASE AT NASHVILLE HAS BEEN 59,180.

THE INCREASE AT CHATTANOOGA HAS BEEN 26,555.

Counsel for carriers, in his printed arguments in the courts below, gives the following statistics, purporting to be taken from the United States Census Reports:

Decade from 1860 to 1870.

Population of Nashville in 1860	16,988
Population of Nashville in 1870	25,865
Increase of 52 per cent	8,877
Population of Chattanooga in 1860	2,545
Population of Chattanooga in 1870	6,093
Increase of 139 per cent	3,548

Decade from 1870 to 1880.

Population of Nashville in 1870	25,865
Population of Nashville in 1880	43,350
Increase of 67 per cent	17,485
Population of Chattanooga in 1870	6,093
Population of Chattanooga in 1880	12,892
Increase of 111 per cent	6,799

Decade from 1880 to 1890.

Population of Nashville in 1880	43,350
Population of Nashville in 1890	76,168
Increase of 75 per cent	32,818
Population of Chattanooga in 1880	12,892
Population of Chattanooga in 1890	29,100
Increase of 125 per cent	16,208

These statistics are introduced to show that Chattanooga has prospered more than Nashville, notwithstanding Chattanooga has been *handicapped* by rates giving Nashville so great a preference over Chattanooga, as has been shown in this case.

This, if it be true, results from Chattanooga's great natural advantages. A fleet race horse, though handicapped, often wins the race, but this is no evidence he is not handicapped.

But these statistics do not prove that Chattanooga has prospered more than Nashville. THEY SHOW THE CONTRARY.

Counsel for carriers calls the attention of the court to the *percentages of increase*, and *not the actual increase* in population, respectively, of Chattanooga and Nashville. The percentage of increase manifestly is always greater with reference to a small than a large city. For example, Possum Snout, in Haralson County, Ga., had a population of 50 one year, and within a year afterwards had grown to 150, an increase of 200 per cent in

one year, which, if kept up for a decade, would amount to 2,000 per cent.

Nashville started out in 1860 with a population of 16,988, about seven times the population of Chattanooga, which was then 2,545; hence a comparatively small increase in the populatiom of Chattanooga would amount to a greater percentage than a much larger increase in the population of Nashville. *Two (2) is a larger percentage of 1 than 5 is of 7.* An increase of *a half million* in the population of New York would not be as large a percentage of its prior population as an increase of 70,000 would be of the prior population of Nashville.

The true test is the *actual increase* in population, which for the three decades, as to Nashville and Chattanooga, is as follows:

Nashville increase from 1860 to 1870	8,877
Chattanooga increase from 1860 to 1870	3,548

Nashville increase about three times that of Chattanooga.

Nashville increase from 1870 to 1880	17,485
Chattanooga increase from 1870 to 1880	6,799

Nashville increase nearly three times as great as Chattanooga increase.

Nashville increase from 1880 to 1890	32,818
Chattanooga increase from 1880 to 1890	16,208

Nashville increase over twice as large as Chattanooga increase.

The total increase of Nashville in population for the three decades appears to be 59,180, while that of Chattanooga was only 26,555.

When we consider Chattanooga's natural advantage in being located 151 miles nearer ocean competition at the South Atlantic ports and the same distance nearer by all the direct and most practicable lines to sources of supply in Eastern seaboard cities, and the further fact that Chattanooga has nine railroads, while Nashville has only two, the excess of Nashville's growth over that of Chattanooga is "startling," *and can only be attributed to the discrimination in rates against Chattanooga and in favor of Nashville, which has prevailed during a large portion of the three decades from 1860 to 1890.*

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